# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 672

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. KING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

## INDEX TO APPENDIX



332-289—69——1

# RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF CLAIMS
## No. 248–65

| 1965 date | Filings-Proceedings |
|---|---|
| July 26, 1965 | Petition filed. |
| Nov. 22, 1965 | Defendant's answer to plaintiff's petition filed. |
| *1966* | |
| Aug. 19, 1966 | Defendant's motion to dismiss the petition filed. |
| *1967* | |
| Feb. 10, 1967 | Court filed order granting the filing of briefs on the applicability of the Declaratory Judgment Act and granting plaintiff leave to dismiss the petition without prejudice if he does not wish to proceed on this basis. |
| *1968* | |
| Feb. 16, 1968 | Defendant's motion to dismiss the petition is denied, plaintiff is granted permission to amend his petition and the case thereafter to be returned to the trial commissioner for further proceedings as set forth in the opinion. Opinion by Judge Davis. |
| Mar. 15, 1968 | Defendant's motion for reconsideration filed. |
| Mar. 25, 1968 | Amendment to Petition filed. |
| Mar. 29, 1968 | Defendant's answer to first amended petition filed. |
| Jun. 14, 1968 | See case no. 622–52 for court order denying defendant's motion for reconsideration. |
| 1969 | |
| Jan. 17, 1969 | Order of the Supreme Court granting the petition for a writ of certiorari, dated January 13, 1969, filed. |

# In the United States Court of Claims

No. 248-65

JOHN P. KING, NAHA, OKINAWA, RYUKYU ISLANDS, PLAINTIFF

*v.*

THE UNITED STATES, DEFENDANT

## PETITION

Filed July 26, 1965

1. Plaintiff is a citizen of the United States and a resident of the State of California.

2. Plaintiff invokes the jurisdiction of this Honorable Court under Title 28, United States Code, Section 1491, and all other applicable Federal laws.

3. Plaintiff was born June 8, 1897. He served in the United States Army in an enlisted status from September 2, 1916 to October 29, 1918, and on active duty as a commissioned officer from October 30, 1918 to November 23, 1919. From November 24, 1929 to June 7, 1942 plaintiff was in an inactive reserve commissioned status. From June 8, 1942 to July 31, 1959 plaintiff served on continuous active duty as a commissioned officer. On July 31, 1959 he was retired by reason of years of service in the grade of Colonel under the provisions of Title 10, United States Code, Section 3911, having at that time 20 years, 4 months and 14 days of active service and 30 years, 9 months and 3 days of total service for pay purposes. He was assigned serial number 0 474 073.

4. On May 14, 1959 plaintiff appeared with counsel before a Physical Evaluation Board (hereinafter referred to as PEB) convened at the United States Army Hospital, Camp Zama, Japan and testimony was taken. At the conclusion of this proceeding the PEB found plaintiff unfit for active duty by reason of the following conditions: (1) Degenerative joint disease,

multiple, due to unknown cause (Osteoarthritis), moderate, 30% disabling; (2) Arthritis, due to direct trauma, left ankle, moderate, 20% disabling; (3) ankylosis, left talocalcaneo fusion, surgical, left, in poor weight bearing position, moderate, 20% disabling; and (4) general arteriosclerosis, moderate, 20% disabling. The PEB determined that these findings warranted a combined disability rating of 60%, and recommended plaintiff be placed on the Temporary Disability Retired List and reevaluated on December 1, 1960. A specific and detailed statement of the factors upon which the PEB based its recommendations was appended to the proceedings by its President.

5. On June 18, 1959 plaintiff's case was considered by the Army Physical Review Council (hereinafter referred to as APRC) which modified the PEB proceedings and substituted a finding that plaintiff was physically fit for the performance of active duty commensurate with *age* and rank. In its communication of June 23, 1959, wherein plaintiff was advised of the action of the APRC reference was made to Paragraphs 2, 69, 89, and 82 of Army Regulation 40–504 as being pertinent to its action. The APRC did not set forth any statement as to its findings; nor the pertinence of the cited provisions of the regulation; nor any other basis for its conclusion. Regulations governing the procedures of the APRC did not provide for the appearance of plaintiff or counsel.

6. On July 7, 1959 plaintiff disagreed with the APRC's modified findings and submitted a rebuttal thereto.

7. On July, 21 1959 the Army Physical Disability Appeal Board (hereinafter referred to as APDAB), again in the absence of plaintiff or counsel, purporting to have considered plaintiff's rebuttal, concurred with the APRC's modified findings. On July 31, 1959, as a result of the foregoing action, plaintiff, by direction of the Secretary of the Army, was retired for years of service.

8. On August 22, 1959 plaintiff filed an application for correction of military records with the Army Board for Correction of Military Records (hereinafter referred to as ABCMR) wherein he requested that his records be corrected to show him retired by reason of physical disability.

9. At the request of ABCMR the Office of the Surgeon General, Department of the Army, (hereinafter referred to as SGO), on October 22, 1959 expressed the opinion that although plaintiff's conditions *were ratable* under the Veterans Administra-

tion *Schedule for Rating Disabilities* they were not unfitting for further active military service. This opinion was rendered without a physical examination of plaintiff.

10. On September 6, 1960 plaintiff propounded interrogatories to the SGO pertinent to the basis upon which its opinion was based. By letter dated September 12, 1960 the SGO advised counsel that the information sought had been referred to ABCMR.

11. By letter dated October 21, 1960 plaintiff, through counsel, requested the appearance of the Chief, Physical Standards Division, SGO, at the ABCMR hearing then scheduled for November 23, 1960. By letter dated November 8, 1960 ABCMR advised that, under a policy approved by the Under Secretary of the Army precluding ABCMR from permitting cross-examination of Army medical officers who render opinions on cases before that board, the request of October 21, 1960 was denied.

12. On November 22, 1960, in reply to plaintiff's request for a statement as to the basis for the action of the APDAB, plaintiff was advised that the APDAB did not divulge the basis for its decision.

13. The same interrogatories propounded to the SGO were propounded to ABCMR on December 5, 1960. ABCMR, by letter dated December 19, 1960, declined to respond to the interrogatories.

14. On January 25, 1961 a hearing was held by the ABCMR.

15. Proceedings prepared by the ABCMR, dated January 25, 1961 (Pages 1 and 2) reflect that the application was denied by a majority vote on that date. Page 3 of the proceedings, dated May 2, 1961, under "Findings" shows that on February 3, 1961 plaintiff's entire file, including a transcript of January 25, 1961 hearing and exhibits, were referred to the SGO for "additional study" and that on April 24, 1961 SGO again expressed the opinion that plaintiff was not eligible for physical disability retirement at time of separation on July 31, 1959. ABCMR concurred with the APRC's modified findings as concurred in by the APDAB and supported by the "several" SGO opinions.

16. Neither plaintiff or counsel were furnished with notice of ABCMR's action in its referral of the case to SGO on February 3, 1961. Neither plaintiff, nor counsel were furnished

a copy of the SGO opinion of April 24, 1961 prior to denial of plaintiff's application. Neither plaintiff nor counsel were furnished a copy of the SGO opinion of April 24, 1961, prior to denial of plaintiff's application. Neither plaintiff nor counsel were furnished with notice of the reconvening of the ABCMR, if in fact it did reconvene, in further consideration of the April 24, 1961 SGO opinion. Formal denial of the application was made by the Under Secretary of the Army on May 19, 1961.

17. Plaintiff alleges that at the time of his retirement on July 31, 1959 he was unfit for general military service by reason of the physical disabilities set forth in the PEB evaluation of May 14, 1959, as well as the aortic aneurysm plaintiff's medical witness described at the ABCMR hearing. These disabilities have continued to persist up to the present time and are permanent in nature.

18. The action of the Secretary of the Army in failing to grant plaintiff physical disability retirement was arbitrary, capricious, not supported by the evidence and contrary to law and regulation. The action of the Secretary of the Army, acting by and through ABCMR, in the refusal to respond to the interrogatories propounded by plaintiff; in the refusal to permit cross-examination of a medical witness or witnesses whose opinions the ABCMR considered in its consideration of plaintiff's application; the referral of the case to the SGO and consideration of the April 24, 1961 advisory opinion without notice to plaintiff or counsel; and the taking of action based on said advisory opinion without notice to plaintiff or counsel or according plaintiff an opportunity to rebut said opinion, was arbitrary, capricious and contrary to law. The failure of the Secretary of the Army, through the action of the ABCMR, to grant plaintiff physical disability retirement was arbitrary, capricious, and contrary to the evidence and the law.

WHEREFORE, plaintiff prays for judgment against defendant for physical disability retirement with retired pay equal to 75% of the pay of a Colonel, United States Army Reserve with over 30 years of service, from July 31, 1959, less such net retirement pay for years of service heretofore paid to plaintiff,

the amount to be determined under Rule 47c, and for such other and further relief as may be deemed just and proper.

.....

NEIL B. KABATCHNICK,
*910 17th Street, NW,*
*Washington, D.C. 20006,*
*Attorney for Plaintiff.*

*Of Counsel:*

.....

RICHARD H. LOVE,
*1010 Vermont Avenue, NW,*
*Washington, D.C.*

## DEFENDANT'S ANSWER

November 22, 1965

For its answer to the petition herein, defendant admits, denies and alleges, as follows:

1. Admits the allegations of paragraph 1.

2. The allegations of paragraph 2 are deemed to be conclusions of law which defendant is not required to affirm or deny. To the extent that they may be deemed to be allegations of material fact, the allegations of paragraph 2 are denied.

3. to 6., Inclusive. Admits the allegations of paragraphs 3 to 6, inclusive.

7. Denies the allegation of paragraph 7 that the Army Physical Disability Appeal Board did not in fact consider plaintiff's rebuttal. The remaining allegations of paragraph 7 are admitted.

8. Denies the allegation of paragraph 8 that plaintiff's application was filed on August 22, 1959, and alleges further that the correct date of filing was August 25, 1959. The remaining allegations of paragraph 8 are admitted.

9. to 16., Inclusive. Admits the allegations of paragraphs 9 to 16, inclusive.

17. and 18. Denies the allegations of paragraphs 17 and 18.

19. Except as herein admitted, denied or otherwise qualified, defendant denies all allegations contained in the petition.

### FIRST AFFIRMATIVE DEFENSE

20. As a first affirmative defense, defendant alleges that the petition fails to state a claim upon which relief can be granted.

The retired pay of a colonel with over 30 years of service is the same whether retirement is based upon years of service or longevity retirement. The petition alleges basically a claim for a refund of taxes paid on retirement pay, without an allegation of the filing of a claim for refund with the Commissioner of Internal Revenue, as required by 26 U.S.C. 7422(a).

WHEREFORE, defendant demands that the petition be dismissed.

JOHN W. DOUGLAS,
*Assistant Attorney General,*
*Civil Division.*

ARTHUR E. FAY,
*Attorney, Civil Division,*
*Department of Justice.*

## PROCEEDINGS

DEPARTMENT OF THE ARMY,
ARMY BOARD FOR CORRECTION OF MILITARY RECORDS,
*Washington 25, D.C., 25 January 1961.*

*In the case of: John P. King,* 0 474 073

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the hearing and deliberation. The following findings, conclusions and recommendations were adopted by the Board.

Applicant requests correction of military records as stated in application to the Board and restated in Case Summary, Exhibits A and B.

The Board, having studied the summary(s) prepared by its staff in the case of the applicant, convened at the call of the Chairman on the above date and, following further consideration and having made its determination of the case, proceeded to other business.

Present: *Mr. Gordon D. Taft,* Chairman; *Mr. Chelsea L. Henson,* Member; *Mr. Richard B. Belnap,* Member; *Mr. Oliver E. Deming, Jr.,* Member; *Mr. Jack L. Guthrie,* Member; *Mr. Raymond J. Williams,* Executive Secretary.

Applicant ~~(did)~~ (did not) appear before the Board. He (was) ~~(was not)~~ represented by counsel.

The Board considered the following evidence: Exhibit A, Application for correction of military records. Exhibit B, Case Summary by Examiner James J. Kelly. Exhibit C, Transcript of Hearing. Exhibit D, AG 201 File, Efficiency File and Medical Records. Exhibit E.

THE BOARD FINDS

1. That the applicant has exhausted all administrative remedies afforded by existing law or regulations.

2. That it incorporates and adopts by this reference so much of the Case Summary, Exhibit B above, as pertains to the factual showing of the Department of the Army records which generally reflect:

a. That the applicant requests correction of his military records to show him retired from active service on 31 July 1959 by reason of physical disability;

b. That he was born on 8 June 1897; that he served on active duty as an enlisted man from 2 September 1916 through 29 October 1918; that he performed active commissioned officer service from 30 October 1918 through 23 November 1919; that he performed inactive commissioned officer service from 24 November 1919 through 7 June 1942; that on 8 June 1942 he entered upon active duty in the grade of first lieutenant, Army of the United States; that on 20 January 1943 he was promoted to captain, Army of the United States; that on 10 April 1944 he was promoted to major, Army of the United States; that on 9 March 1945 he was promoted to lieutenant colonel, Army of the United States; that on 26 May 1947 he accepted appointment as colonel, Officers Reserve Corps; and that on 5 November 1952 he accepted an indefinite reappointment as colonel, United States Army Reserve; and that on 20 July 1955 he was promoted to temporary colonel;

c. That on 30 June 1957, during which month he attained age 60, he had completed 18 years, 3 months and 14 days of active military service; that he was retained on active duty thereafter in order to complete 20 years of active service for retirement purposes under the provisions of 10 U.S.C. 3911; that on 22 January 1958 the Adjutant General's Office advised him of his mandatory relief from active duty on 30 April 1959 under the maximum service policy, and of his eligibility for voluntary retirement effective 31 March 1959 under 10 U.S.C. 3911; that he requested retirement effective 31 March 1959

under 10 U.S.C. 3911; that on 10 March 1959 a Medical Board found him physically fit for active duty, but recommended appearance before a Physical Evaluation Board; that on 14 May 1959 the Physical Evaluation Board found him unfit by reason of: (1) degenerative joint disease, multiple, due to unknown cause (osteoarthritis), moderate, 30 percent, (2) arthritis, due to direct trauma, left ankle, moderate, 20 percent, (3) ankylosis, left talocalcaneo fusion, surgical, left, in poor weight-bearing position, moderate, 20 percent, and (4) general arteriosclerosis, moderate, 20 percent; that the Board recommended his placement on the Temporary Disability Retired List with a combined rating of 60 percent; that on 18 June 1959 the Army Physical Review Council modified the Physical Evaluation Board proceedings by substituting a finding of physical fitness for active duty commensurate with his age and rank; that on 21 July 1959 the Army Physical Disability Appeal Board considered his rebuttal, and concurred with the modified findings of the Army Physical Review Council; that on 31 July 1959 he was retired from active service under the provisions of 10 U.S.C. 3911, after more than 20 years of active Federal service; and that he was placed on the Army of the United States Retired List effective 1 August 1959 in the grade of colonel;

d. That on 22 October 1959 the Surgeon General's Office commented that while at age 62 he presented a variety of physical impairments for which he was considered by a Physical Evaluation Board, none of such impairments were, in the opinion of the Medical Board, the Army Physical Review Council and the Army Physical Disability Appeal Board, unfitting for military service. The opinion was expressed that his records did not substantiate a finding that he was retirable by reason of physical disability at the time of his separation from the service on 31 July 1959; and

e. That on 3 February 1961 his entire file, including a Transcript of Hearing before the Army Board for Correction of Military Records on 25 January 1961, and exhibits submitted by counsel at that time, were referred to the Surgeon General's Office for additional study; and that on 24 April 1961 the Surgeon General's Office again expressed opinion that he was not eligible for physical disability retirement at the time of his separation from service on 31 July 1959.

THE BOARD CONCLUDES

1. That it concurs in the modified finding of the Army Physical Review Council as concurred in by the Army Physical Disability Appeal Board and supported by the several opinions of the Surgeon General's Office, that at the time of the applicant's release from active duty on 31 July 1959, the records did not substantiate a finding that he was eligible for retirement by reason of physical disability.

2. That in consideration of the foregoing findings and conclusion, there is insufficient evidence of error or injustice in the applicant's case to warrant granting the relief requested.

THE BOARD RECOMMENDS

That in the case of JOHN P. KING, his application for correction of military records, be denied.

DISSENT

A minority (one member) dissents from the foregoing conclusions and recommendation and recommends that the applicant's records be corrected as requested.

Gordon D. Taft,
GORDON D. TAFT,
*Chairman.*

## DEFENDANT'S MOTION TO DISMISS THE PETITION

Defendant moves the Court for an order dismissing the petition herein on the grounds that the petition fails to state a claim upon which relief can be granted. This Court has jurisdiction only to render a money judgment. Since plaintiff has been paid longevity retirement pay at the rate of 75 percent of the monthly basic pay of a colonel, and since 75 percent of the monthly basic pay of a colonel is the maximum plaintiff would have been entitled to receive if retired for disability, there is not increase in retirement pay to which plaintiff is entitled for which the Court can enter a monetary judgment. In support of its motion, defendant relies upon the attached brief.

ORDER

Filed February 10, 1967

This case comes before the court on defendant's motion, filed August 19, 1966, to dismiss the petition, and on plaintiff's motion, filed November 21, 1966, to strike defendant's first affirmative defense. Upon consideration thereof, together with the opposition and responses thereto, since the court is of the view that the only possible basis upon which the case can be maintained is under the Declaratory Judgment Act, it therefore requests briefs on the applicability to this court and this case of that Act and will set the case for oral argument on those issues.

IT IS THEREFORE ORDERED that plaintiff is granted 30 days from this date to submit a brief on the applicability of the Declaratory Judgment Act to this court and this case with defendant granted 30 days to file its response and plaintiff 15 days to reply.

IT IS FURTHER ORDERED that if plaintiff does not wish to proceed on the basis set forth herein, he has leave to dismiss the petition without prejudice.

BY THE COURT

WILSON COWEN,
*Chief Judge.*

In the United States Court of Claims

No. 248–65

(Decided February 16, 1968)

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JOHN P. KING *v.* THE UNITED STATES

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Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

In 1959 Colonel John P. King was retired from the Army for longevity (*i.e.*, years of service) after having accrued over thirty years for pay purposes. Under 10 U.S.C. §§ 3911, 3991 (1964), his longevity retirement pay rate has been 75 per cent of the monthly basic pay of a colonel. He contends, however, that he

should have been retired for disability and that the Secretary of the Army (through the Physical Disability Appeal Board and the Board for Correction of Military Records) acted arbitrarily and capriciously in failing to retire him for disability and in refusing to correct his military record to show retirement on that ground.

Were plaintiff retired for disability, the maximum retirement pay rate to which he would then be entitled would be the same as that for longevity. See 10 U.S.C. §§ 1201, 1401 (1964). But Int. Rev. Code of 1954, § 104(a)(4), excludes from gross income "amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country * * *." Colonel King, counting on the application of this provision to the disability retirement pay he claims, filed his petition here for the difference—equal to the Federal taxes assessed on his retirement pay—between disability pay and the longevity compensation he has received after taxes.

Before bringing suit, he did not, however, file a claim with the Commissioner of Internal Revenue for a refund of the taxes paid on his retirement benefits. Since Int. Rev. Code of 1954, § 7422(a), bars a suit for taxes in the absence of a timely refund claim, we issued an order [1] upholding, in effect, the Government's first affirmative defense (that the "petition alleges basically a claim for a refund of taxes paid on retirement pay, without an allegation of the filing of a claim for refund") and suggesting that the sole relief which plaintiff could now possibly have from this court would be a declaration of his right to be retired for physical disability and to have his records changed accordingly. *Compare Prince* v. *United States*, 127 Ct. Cl. 612,

[1] "This case comes before the court on defendant's motion, filed August 19, 1966, to dismiss the petition, and on plaintiff's motion, filed November 21, 1966, to strike defendant's first affirmative defense. Upon consideration thereof, together with the opposition and responses thereto, since the court is of the view that the only possible basis upon which the case can be maintained is under the Declaratory Judgment Act, it therefore requests briefs on the applicability to this court and this case of that Act and will set the case for oral argument on those issues.

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IT IS THEREFORE ORDERED that if plaintiff does not wish to proceed on the basis set forth herein, he has leave to dismiss the petition without prejudice."

614, 623, 119 F. Supp. 421, 422 (1954), (a similar suit in which timely refund claims had been filed).

Because of the history of the point in this court (see Part I *infra*) and on account of the defendant's explicit challenge (in its motion to dismiss) to our authority to give declaratory relief, we invited reconsideration of the application of the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1964), to the Court of Claims and to Colonel King's case. Plaintiff and defendant have each presented briefs and oral argument. In addition, the amicus curiae, in support of plaintiff, has offered written and oral arguments of great help. We are not now concerned, it need hardly be said, with the merits of the plaintiff's retirement for longevity, rather than physical disability, or the refusal to correct his military records. The sole issue at this stage is the pertinence of the Declaratory Judgment Act, which provides:

> 2201. *Creation of remedy.*
>
> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> 2202. *Further relief.*
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and heaing, against any adverse party whose rights have bee determined by such judgment.

## I

Since this is a reworking of old ground, not a first plowing, we start with the embedded authority. There are, of course, a raft of cases which can conceivably be seen as warning that a declaration may not be granted by this court or in suits

against the United States.[2] The vast majority are quite distinguishable. Among them are decisions in which declaratory relief could not be granted because the suit was "with respect to federal taxes", a category expressly exempt from the Declaratory Judgment Act,[3] and those in which the prayer for relief, either explicitly or as construed by the court, was for specific relief.[4] Nor do we think that any considered implication of the absence of the remedy can be drawn from decisions limiting a money recovery in this court to the amount owing at the date of judgment;[5] holding that, for the purposes of the statute of limitations, "no cause of action accrues before the claimant can bring a suit for a money judgment";[6]

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[2] We deal only with declaratory relief against the United States *eo nomine*, not with declarations directed exclusively to specific public officials. "There can now be little question that a suit will lie against a * * * [public officer] for acting beyond his statutory authority, even though a subordinate, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701–02, 69 S. Ct. 1457, 93 L.Ed. 1628; and the declaratory judgment, together with an enforcing injunction, furnishes a proper devise to test the scope of this authority. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 139–40, 71 S. Ct. 624, 95 L.Ed. 817." *United States Lines Co.* v. *Shaughnessy*, 195 F. 2d 385, 386 (C.A. 2, 1952).

It is clear that the district courts, under the jurisdictional grants of 28 U.S.C. §§ 1331(a), 1361 (1964) (and the pertinent District of Columbia provisions) and within the venue limitations of 28 U.S.C. § 1391(e) (1964), may issue declaratory judgments and relief in the nature of mandamus with respect to corrections in military records when the responsible official has exceeded his statutory or constitutional powers. See *e.g.*, *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Van Bourg* v. *Nitze*, 388 F. 2d 557 (C.A.D.C., 1967); *Ashe* v. *McNamara*, 355 F. 2d 277 (C.A. 1, 1965); *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C., 1961); *Bland* v. *Connally*, 293 F. 2d 852 (C.A.D.C., 1961).

[3] See, *e.g.*, *Sweeney* v. *United States*, 152 Ct. Cl. 516, 522, 285 F. 2d 444, 447 (1961); *Wilson* v. *Wilson*, 141 F. 2d 599, 600 (C.A. 4, 1944); *Farmer* v. *Hooks*, 194 F. Supp. 1 (E.D. Ky. 1961).

[4] See *Blanc* v. *United States*, 244 F. 2d 708 (C.A. 2), *cert. denied*, 355 U.S. 874 (1957); *Kelly* v. *United States*, 133 Ct. Cl. 571, 138 F. Supp. 244 (1956); *Gaines* v. *United States*, 132 Ct. Cl. 408, 131 F. Supp. 925 (1955); *Clay* v. *United States*, 210 F. 2d 686 (C.A.D.C., 1953), *cert. denied*, 347 U.S. 927 (1954); *Hart* v. *United States*, 91 Ct. Cl. 308 (1940); *Ford Bros & Co.* v. *Eddington Distilling Co.*, 30 F. Supp. 213 (M.D. Pa. 1939).

[5] See, *e.g.*, *Shaw* v. *United States*, 174 Ct. Cl. 899, 920, 357 F. 2d 949, 963 (1966). This is a routine practice followed for years without inquiry into the possibility of extending recovery beyond the date of judgment.

[6] *Oceanic S.S. Co.* v. *United States*, 165 Ct. Cl. 217, 218 (1964). There the court did not reconsider the possibility of a declaratory remedy. We do not decide whether the availability of declaratory relief would require a re-evaluation of the *Oceanic* holding. *Compare Luckenbach S.S. Co.* v. *United States*, 312 F. 2d 545 (C.A. 2, 1963); *American-Foreign S.S. Corp.* v. *United States*, 291 F. 2d 598 (C.A. 2), *cert. denied*, 368 U.S. 895 (1961).

and indicating that the Tucker Act does not supply jurisdiction to grant nominal damages.[7]

In addition, the denial of declatory relief in this court and in other suits against the United States has often rested squarely on the ground that the court had no right to grant *any* relief (money award, specific relief, or declaratory judgment) because, in the various phrasings used in the opinions, the Government had not consented to be sued on the particular cause of action, the matter was nonjusticiable, there was no jurisdiction over the subject matter, the issue was legislatively committed to exclusive agency discretion, relief would interfere with the remedial scheme established by the Congress, or the claimant failed to set up any valid cause of action.[8] Similarly,

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[7] "[T]he futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract." *Severin* v. *United States*, 99 Ct. Cl. 435, 443 (1943) (alternative holding), *cert. denied*, 322 U.S. 733 (1944). In *Severin* the court relied on one of the "Gold Clause" cases, *Nortz* v. *United States*, 294 U.S. 317, 327 (1935), where the Supreme Court stated that "the Court of Claims has no authority to entertain the action, if the claim is at best one for nominal damages." *Accord*, *Perry* v. *United States*, 294 U.S. 330, 355, (1935); *Marion & R.V. Ry.* v. *United States*, 270 U.S. 280, 282 (1926); *Grant* v. *United States*, 7 Wall. (74 U.S.) 331, 338 (1868) (alternative holding).

While a suit for nominal damages, like a declaratory judgment, may be instituted "to establish a right" for the purpose of terminating an ongoing dispute or of avoiding future damages (*Restatement of Torts* § 907, comment *b*, at 558 (1939)), it is sometimes used for pure vindication without any view to the future or redress for the judicially cognizable effects of the past (see, *e.g.*, *ibid*; *Wilson* v. *Eberle*, 18 F.R.D. 7, 9 (D. Alaska 1955)). In the cases cited above, nominal damages were thought to serve, at best, only the latter function; there was deemed to be no real existing injury. The decisions should not, therefore, be read as antagonistic to the use of the declaratory device to adjudicate rights and liabilities without regard to the question of the recovery of damages, but rather as a particularized application of the doctrine that the federal courts cannot act in the absence of an existing "case" or "controversy". (It is hardly likely, moreover, that the Supreme Court had the Declaratory Judgment Act in mind when it decided the "Gold Clause" cases since that innovation had been adopted only a few months before.) That the "nominal damages" cases do allow separation of the issues of liability and damages is bolstered by the Court's careful distinction in *Perry* v. *United States*, *supra*, 294 U.S. at 354, between the questions of "the binding quality of the Government's obligations" and "plaintiff's right to recover damages." Our practice under Ct. Cl. R. 47 has long been to first determine liability and then to determine the recovery, if any, to which the plaintiff is entitled. See Part III *infra*.

[8] *Rolls-Royce Ltd.* v. *United States*, 176 Ct. Cl. 694, 701, 364 F. 2d 415, 419–20 (1966) (intervenor's counterclaim against plaintiff—lack of jurisdiction); *Drill v. United States*, 157 Ct. Cl. 945 (1962) (order), *cert. denied*, 372 U.S. 912 (1963) (plaintiff had no constitutional or statutory right to a federal job); *Savorgnan* v. *United States*, 171 F. 2d 155, 159 (C.A. 7, 1948), *aff'd on other grounds*, 338 U.S. 491 (1950) (United States citizenship—no consent to

in many of the cases saying broadly that a declaration cannot be given in litigation against the Government, the real concern was that granting a declaratory judgment would improperly circumvent the restrictions (judicial or legislative) on other forms of relief.[9]

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suit); *Love* v. *United States*, 108 F. 2d 43, 50 (C.A. 8, 1939), *cert. denied*, 309 U.S. 673 (1940) (denial of federal employment—nonjusticiable because committed to agency discretion); *Wohl Shoe* v. *Wirtz*, 246 F. Supp. 821 (E.D. Mo. 1965) (liability under Fair Labor Standards Act—nonjusticiable because exclusive remedy lies in defense of Secretary of Labor's enforcement suit); *Bell* v. *United States*, 203 F. Supp. 371, 374 (W.D. Wis. 1962) (alternative holding) (length of criminal sentence—no consent); *Di Battista* v. *Swing*, 135 F. Supp. 935 (D. Md. 1955) (suit to have immigration bond declared not breached even though Government had not collected on the bond); *Birge* v. *United States*, 111 F. Supp. 685 (W.D. Okla. 1953) (refusal to add disability-income clause to National Service Life Insurance Act policy—not subject to judicial review); *Schilling* v. *United States*, 101 F. Supp. 525 (E.D. Mich. 1951) (refusal to issue National Service Life Insurance Act policy—not subject to judicial review); *New York Technical Institute of Md.* v. *Limburg*, 87 F. Supp. 308, 311–13 (D. Md. 1949) (alternative holding) (regulation of Trade School tuition under Servicemen's Readjustment Act—nonjusticiable because committed to agency discretion); *Commers* v. *United States*, 66 F. Supp. 943, 949–50 (D. Mont. 1946) (alternative holding), *aff'd per curiam*, 159 F. 2d 248 (C.A. 9), *cert. denied*, 331 U.S. 807 (1947) (induction into Army as a taking—no consent).

Declaratory relief against the United States has also been denied when the subject matter was within the exclusive jurisdiction of the Court of Claims. See *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912 (C.A. 2), *cert. denied*, 364 U.S. 894 (1960) (amount in contract suit exceeded $10,000); *Powers* v. *United States*, 218 F. 2d 828 (C.A. 7, 1954) (retirement benefits); *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 868, 871–72 (C.A. 9, 1953) (alternative holding) (Court of Claims remedy for claim in excess of $10,000 precludes jurisdiction based on Administrative Procedure Act); *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 150 (C.A.D.C., 1951) (amount in contract suit exceeded $10,000). Even where mandamus or specific relief might properly lie against a Government officer, see note 2 *supra*, the courts have sometimes declined, most often as a matter of discretion, to issue a declaratory judgment against the official when the plaintiff has a remedy in the Court of Claims. See *Almour* v. *Pace*, 193 F. 2d 699 (C.A.D.C., 1951); *Di Benedetto* v. *Morgenthau*, 148 F. 2d 223 (C.A.D.C.), *petition for cert. dismissed on motion of petitioner*, 326 U.S. 686 (1945); *Western* v. *McGehee*, 202 F. Supp. 287, 293–94 (D. Md. 1962) (alternative holding); cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 132 (1940).

[9] This class is illustrated by a number of examples: (*i*). The Supreme Court has indicated that the judiciary should keep its hands off executive dealings in publicly-owned real property and that inverse condemnation suits for constitutional takings should be considered the primary avenue of relief. See *Malone* v. *Bowdoin*, 369 U.S. 643, 646–48 (1962); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703–05 & n. 27 (1949). In our view this attitude permeates the denials of declaratory relief in *Anderson* v. *United States*, 229 F. 2d 675 (C.A. 5, 1956) (Veteran's Administra-

This survey shows, we think, that we need not be daunted in our reconsideration by the great mass of the repeated observations that the declatory device is unavailable in actions

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tion disposal of condemned lands); *Lynn* v. *United States*, 110 F. 2d 586 (C.A. 5, 1940) (declaration of rights under deed of land made to United States); *Trueman Fertilizer Co.* v. *Larson*, 196 F. 2d 910, 911 (C.A. 5, 1952) (dictum) (General Services Administration's disposal of condemned lands).

(*ii*). Int. Rev. Code of 1954, § 7421(a), states: "Except as provided in sections 6212 (a) and (c) and 6213 (a) [suits in the Tax Court], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Relying on this statement of Congressional policy rather than the Declaratory Judgment Act's specific exception for suits "with respect to federal taxes", some courts have refused to enter a declaratory judgment against the Government where the administration of the tax laws was, directly or indirectly, at issue. See *Balistrieri* v. *United States*, 303 F. 2d 617 (C.A. 7, 1962) (right to inspect books in possession of special revenue agent); *Zito* v. *Tesoriero*, 239 F. Supp. 354 (E.D.N.Y. 1965) (dispute over property claimed, in part, by United States under revenue laws). *But see Pettengill* v. *United States*, 205 F. Supp. 10, 12 (D. Vt. 1962) (alternative holding). See also note 14 *infra*.

(*iii*). Declaratory judgments have been refused where a writ of habeas corpus (the accepted remedy for prisoners) was unavailable, the courts saying that the petition was premature, the petitioner failed to exhaust his administrative remedies, the writ had been denied in a prior proceeding, or the petition lacked merit. See *Gibson* v. *United States*, 161 F. 2d 973 (C.A. 6, 1947); *Innes* v. *Hiatt*, 57 F. Supp. 17 (M.D. Pa. 1944); *United States* v. *Rollnick*, 33 F. Supp. 863, 866–67 (M.D. Pa. 1940).

(*iv*). Since the Interstate Commerce Act provides for relief from Commission actions, a litigant cannot "by-pass the statutory requirements and then rely on his refusal to follow the statutory procedure as creating the 'actual controversy' contemplated in the Declaratory Judgment Act." *Isner* v. *ICC*, 90 F. Supp. 361, 366 (E.D. Mich. 1950).

(*v*). Where Congress has made "the recommendation of the head of the Agency and the approval of the Civil Service Commission conditions precedent to the granting of these higher [retirement] benefits, [and] *has not* laid down any rules under which the recommendations of the head of the agency shall be granted", a judicial probe of the officials' reasoning "'would amount to a clear invasion of the legislative and executive domains.'" *Gibney* v. *United States*, 146 F. Supp. 135, 140 (S.D. Cal. 1956), quoting *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380 (1940). A similar rationale appears in *Wells* v. *United States*, 280 F. 2d 275 (C.A. 9, 1960), in which the court was asked to render a declaratory judgment relating to what it considered an unreviewable Atomic Energy Commission determination of the proper sale price for Government lands leased by the AEC to the plaintiff.

Some of the cases in this and the preceding note were brought against a public officer in addition to, or rather than, the United States. Even though the courts tended to treat the suits as "in effect" against the United States or to separate the issues of the suitability of the sovereign and that of the officer, the practical unavailability (to courts other than those in the District of Columbia) of general mandamus power in suits against Government officials obviously made the judges less inclined to grant declaratory relief against either the United States or the named officials. Under 28 U.S.C. §§ 1331(a), 1361, 1391(e) (1964), the power to issue relief in the nature of mandamus is now available to all district courts. E.g., *Ashe* v. *McNamara*, 355 F. 2d 277, 279 (C.A. 1, 1965). See also note 2 *supra*.

against the sovereign. We are faced, however, with a small residue of decisions truly in point, mainly those of our own authorship. The leading adverse case, *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655 (1935), was decided the year after the Declaratory Judgment Act. Others which followed *Twin Cities*, explicitly or implicitly, are *United States Rubber Co.* v. *United States*, 142 Ct. Cl. 42, 55, 160 F. Supp. 492, 500 (1958); *Prentiss* v. *United States*, 115 Ct. Cl. 78, 81 (1949) ("in effect" a suit for a declaratory judgment); and *Yeskel* v. *United States*, 31 F. Supp. 956, 957–58 (D.N.J. 1940). See also *Cobb* v. *United States*, 240 F. Supp. 574, 577–79 (W.D. Ark. 1965) (construing a prayer for declaratory relief as a prayer for money judgment).

On the other hand, *Raydist Navigation Corp.* v. *United States*, 144 F. Supp. 502 (E.D. Va. 1956), holds that a court having Tucker Act jurisdiction of actions against the Government may grant a declaratory judgment. The remedy has also been held proper in comparable Government litigation under (i) the Suits in Admiralty Act,[10] (ii) the National Service Life Insurance Act,[11] (iii) the Trading With the Enemy Act,[12] (iv) the Federal Tort Claims Act (at least as a "procedural step" toward obtaining damages),[13] and (v) 28 U.S.C.

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[10] See *Luckenbach S.S. Co.* v. *United States*, 312 F. 2d 545 (C.A. 2, 1963); *American-Foreign S.S. Corp.* v. *United States*, 291 F. 2d 598, 604 (C.A. 2), *cert. denied*, 368 U.S. 895 (1961); *American President Lines* v. *United States*, 162 F. Supp. 732, 739 (D. Del. 1958), *aff'd per curiam*, 265 F. 2d 552 (C.A. 3, 1959). *Compare American Mail Line* v. *United States*, 213 F. Supp. 152, 160 (W.D. Wash. 1962). In 1961 the Rules of Practice in Admiralty and Maritime Cases were amended to provide for declaratory relief in admiralty suits. See *Luckenbach S.S. Co.* v. *United States*, 155 Ct. Cl. 81, 86 n.6, 292 F. 2d 913, 917 n.6 (1961). With the 1966 consolidation of the admiralty and civil procedure rules, F.R. Civ. P. 57, which is identical to the 1961 admiralty rule, applies to district courts sitting in their admiralty capacity.

[11] See *Unger* v. *United States*, 79 F. Supp. 281, 283–84 (E.D. Ill. 1948). *Compare Birge* v. *United States*, 111 F. Supp. 685 (W.D. Okla. 1953); *Schilling* v. *United States*, 101 F. Supp. 525 (E.D. Mich. 1951).

[12] See *Brownell* v. *Ketcham Wire & Mfg. Co.*, 211 F. 2d 121, 128 (C.A. 9, 1954). In *Schilling* v. *Rogers*, 363 U.S. 666 (1960), the Court held no more than that, since the provision at issue (Section 32(a)) did not provide for judicial review, the district court was without jurisdiction to enter a declaratory judgment. Although it did not cite the Ninth Circuit case, the Court pointed out that Section 9(a), which was the basis of *Ketcham Wire*, does allow judicial review. See 363 U.S. at 671.

[13] See *Pennsylvania R.R.* v. *United States*, 111 F. Supp. 80, 85–89 (D.N.J. 1953). *But see Aktiebolaget Bofors* v. *United States*, 93 F. Supp. 134 (D.D.C. 1950) (*semble*), *aff'd on other grounds*, 194 F. 2d 145 (C.A.D.C., 1951). The Tort Claims Act gives the district courts exclusive jurisdiction of "civil actions on claims against the United States, *for money damages*." 28 U.S.C. § 1346(b) (1964) (emphasis added).

§ 2410 (1964), which provides for actions to quiet title to property on which the United States has or claims a mortgage or other lien.[14]

Despite *Twin Cities* and its influence, this court has indicated in recent years that the question is still open and that declaratory relief may possibly lie against the Government. In *Luckenbach S.S. Co.* v. *United States*, 155 Ct. Cl. 81, 292 F. 2d 913 (1961), the opinion not only took the position that a declaratory judgment could be entered against the United States by a district court sitting in admiralty and administering the Suits in Admiralty Act (155 Ct. Cl. at 85–87, 292 F. 2d at 916–17), but rebutted in a lengthy footnote the plaintiff's broader argument that declaratory relief can never run against the sovereign (155 Ct. Cl. at 85 n. 5, 292 F. 2d at 916 n. 5). (The note cited the cases, *supra*, holding declaratory relief available under the Federal Torts Claim Act and the Tucker Act, as it applys to the district courts.) Furthermore, in *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967), when discussing the limits of our jurisdiction, we expressly "put to one side the possible applicability of the Declaratory Judgment Act * * *." 178 Ct. Cl. at 605 n. 5, 372 F. 2d at 1007 n. 5.

While the Supreme Court has never reviewed the bearing of the Declaratory Judgment Act on Tucker Act controversies,[15]

[14] See *Pettengill* v. *United States*, 205 F. Supp. 10, 12 (D. Vt. 1962) (alternative holding). *But see Zito* v. *Tesoriero*, 239 F. Supp. 354 (E.D.N.Y. 1965). In *Sonitz* v. *United States*, 221 F. Supp. 762, 764 (D.N.J. 1963), the court held that resort to the Declaratory Judgment Act is unnecessary in a Section 2410 suit since an action to quiet title is, in essence, a declaratory action. See also, *e.g.*, S. Rep. 1005, 73d Cong., 2d Sess. 4–5 (1934). This is implicit in other leading cases in the area since no reference is made to the Declaratory Judgment Act. See, *e.g.*, *Falik* v. *United States*, 343 F. 2d 38 (C.A. 2, 1965).

[15] In *Dismuke* v. *United States*, 297 U.S. 167 (1936), *affirming on other grounds* 76 F. 2d 715 (C.A. 1935), the Court scrutinized a decision in which the district court had entered a declatory judgment that the plaintiff was entitled to a certain level of benefits under the Civil Service Retirement Act. See 76 F. 2d at 716. Although the Court held that the district court had Tucker Act jurisdiction, it denied relief on the merits of the claim. In doing so, it merely noted, without discussion, that declatory relief had been requested. See 297 U.S. at 168–69. In *Savorgnan* v. *United States*, 338 U.S. 491 (1950), *affirming* 171 F. 2d 155 (C.A. 7, 1948), *reversing* 73 F. Supp. 109 (W.D. Wis. 1947), the Court recited that the court of appeals had reversed the district court's entry of a judgment against the Government (as well as certain officials) declaring that plaintiff was a United States citizen and had "remanded the case with directions to dismiss the petition against the United States because it had not consented to be sued * * *." 338 U.S. at 494. Although the instruction of the court of appeals was repeated in the

it has often mentioned, in other contexts, that the Court of Claims "has been given jurisdiction only to award money damages * * *." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962); see, *e.g.*, *United States* v. *Jones*, 336 U.S. 641, 670 (1949); *United States v. Sherwood*, 312 U.S. 584, 588 (1941). As discussed in Part III *infra*, we do not believe that the concept of "money judgment" jurisdiction precludes declaratory relief. We are therefore free, as we see it, of any Supreme Court mandate, and need grapple only with *Twin Cities* and the other holdings we have ourselves fathered.

## II

Looking at the problem as if for the first time, one could not help but note that the Declaratory Judgment Act, quoted in full *supra*, provides that "*any court of the United States* * * * may declare the rights and other legal relations of any interested party seeking such declaration." [Emphasis added.][16] On its own terms, "any court of the United States" would normally call for the inclusion of the Court of Claims. See *Kamen Soap Prods. Co.* v. *United States*, 124 Ct. Cl. 519, 530 n. 5, 110 F. Supp. 430, 435, n. 5 (1953) (term as used in statute authorizing issuance of subpoenae *duces tecum*); *cf. Luckenbach S.S. Corp.* v. *United States, supra*, 155 Ct. Cl. at 86, 292 F. 2d at 916–17 (term as used in Declaratory Judgment Act includes admiralty court); *American-Foreign S.S. Corp.* v. *United States, supra* note 10, 291 F. 2d at 604 (same). Even in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Supreme Court, while declining to consider this court a constitutional court, referred to it as "a court of the United States." 279 U.S. at 455. (The constitutional—Article III—status of the Court of Claims is now firmly established. *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962); 28 U.S.C. § 171 (1964).)

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Supreme Court's own disposition (see 338 U.S. at 506), the Court, holding against the plaintiff on the merits, did not discuss this issue. It is apparent that the basis of the court of appeals' statement was the lack of consent to any suit against the *United States*, as such, involving nationality, regardless of the remedy sought. As for the Supreme Court's "nominal damages" cases, see note 7 *supra*. For the reasons stated there, we do not think them pertinent.

[16] Prior to the 1948 codification and revision of Title 28, the phrase read: "the courts of the United States." The change in phraseology was said by the revisers to be inconsequential. See 28 U.S.C. at 6026 (1964) (reviser's notes). See Part V *infra*.

Nonetheless, our court in *Twin Cities* thought the language not clear enough:

> We think the defendant's motion [to dismiss for lack of jurisdiction] should be sustained. In the case of *Pocono Pines Assembly Hotels Co.* v *United States*, [73 Ct. Cl. 447, *motion to file petition for writ of mandamus and/or prohibition denied*, 285 U.S. 526 (1932], we had occasion to discuss *in extenso* the jurisdiction of this court, and in view of the axiomatic legal principle that the United States may not be sued without its consent, we think it exacts a specific statute according such consent and expressly conferring jurisdiction upon this court before we may proceed. *United States* v. *Milliken Imprinting Co.*, [202 U.S. 168 (1906)]; *Eastern Transportation Co.* v. *United States*, [272 U.S. 675 (1927)]; *United States* v. *Michel*, [282 U.S. 656 (1931)].
>
> If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declatory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised. [81 Ct. Cl. at 658].

The initial part of this rationale simply repeats the undeniable proposition that the Court of Claims' jurisdiction is dependent upon and delimited by the United States' consent to be sued and that the consent must be found in legislative enactments. See, *e.g.*, *United States* v. *Sherwood*, *supra*, 312 U.S. at 586. The cases cited stand for that premise and, for present purposes, no more.[17] In the crucial second para-

[17] *Pocono Pines* contains a lengthy discussion of the history of this court, in the course of which it is noted that the Government must consent to be sued. See 73 Ct. Cl. at 485. The spring for this discussion was an Act of Congress appearing to order the court to grant a new trial for the Government after a final judgment had been rendered against it. To avoid the constitutional problems of the Act, the court construed it as a Congressional reference case requesting findings of fact to aid Congress in its legislative function of appropriating monies for the satisfaction of the judgment. *Milliken* holds that Congress, through the Tucker Act, consented to suit on a claim for money on a contract as reformed even though reformation is equitable and not an incident to an action at law. 202 U.S. at 173–74. In *Eastern Transportation*, in-

graph of the quotation, the *Twin Cities* court expresses the view that allowance of declaratory relief would expand the Tucker Act jurisdiction of the court beyond its accepted limits; that Congress, if it meant to consent to the expansion, would have referred to the court by name in the Declaratory Judgment Act; and that, since Congress did not, the court has no warrant to assume declaratory power.

Unlike our predecessors, we believe that (a) the use of declaratory procedures is consistent with the factors historically relevant to defining and delimiting this court's jurisdiction; (b) such use need not expand the categories of claims or issues which we may consider; and (c) Congress has indicated with sufficient clarity that the court is empowered to apply the Declaratory Judgment Act. We consider the first point in Part III, the second in Part IV, and the third in Part V.

## III

When this court had barely emerged from its cocoon, the Supreme Court stated in *United States* v. *Alire*, 6 Wall. (73 U.S.) 573 (1867), that under the 1855 and 1863 Acts establishing the court (Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; Act of March 3, 1863, ch. 92, 12 Stat. 765) "the only judgments which the Court of Claims [was] authorized to render against the government * * * [were] judgments for money found due from the government to the petitioner." 6 Wall. at 575. This was reiterated two decades later in *United States* v. *Jones*, 131 U.S. 1 (1889), in which the Court held that the passage of the Tucker Act in 1887, ch. 359, 25 Stat. 505, had not enlarged the perimeter drawn in *Alire*. All subsequent decisions referring to "money judgment" or "money claim" jurisdiction under the Tucker Act are traceable to *Alire* and *Jones*. The court in *Twin Cities* apparently believed that this firm concept of money-judgment jurisdiction would be violated by the issuance of a declaratory judgment. We can no longer accept that position.

*1. Alire* and *Jones* dealt with prayers for specific equitable relief relating to public lands, not requests for declaratory judg-

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volving a maritime libel against the United States under the Suits in Admiralty Act, the Court held that there is a presumption against the suability of the Government which must be overcome by statute. See 272 U.S. at 686. The *Michel* opinion utilizes the traditional principle that statutes of limitations applicable to suits against the sovereign are strictly construed. See 282 U.S. at 660.

ment.[18] In the course of denying the relief sought in *Alire*, the Court conceded that the 1855 and 1863 Acts established a wide range of "subject-matter over which jurisdiction is conferred."[19] but went on to hold that "the limited power to render a judgment necessarily restrains the general terms" of the statutes. 6 Wall. at 575–76. Since, as construed by the Court, Section 7 of the 1863 Act was "the only one providing for the rendition of a judgment or decree in any case" in the Court of Claims and since Section 7 contemplated solely the payment by the Government of money claims, the Court concluded that Congress had confined "the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." 6 Wall. at 576. In *Jones* the Court adhered to this reasoning, holding that the Tucker Act of 1887 had not altered the statutory basis of *Alire* and adding that "we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts * * * ." 131 U.S. at 19.

*Alire* and *Jones* are thus grounded in two distinct considerations. First, this court's jurisdiction must be defined in terms of the available remedies if Congress has provided means for effectuating only certain forms of relief; and the Tucker Act envisioned the satisfaction solely of money judgments. Second, in the absence of specific legislative authority, the Court was extremely wary of coercing, by means of specific relief, the conduct of public officials, a factor highlighted by the judicial reluctance to become involved in the administration of public lands and Government property. See also note 9 *supra*.

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[18] The judgment or decree entered by this court in *Alire* (and reversed by the Supreme Court) was "that the claimant recover of the government a military land warrant for one hundred and sixty acres of land, and that it be made out and delivered to * * * [the plaintiff] by the proper officer, and the decree to be remitted to the Secretary of the Interior." 6 Wall. at 576. In *Jones* the plaintiffs sought, under the Tucker Act provision granting concurrent jurisdiction to the district and then circuit courts, "equitable relief by specific performance, to compel the issue and delivery of a [timber] patent." 131 U.S. at 14.

[19] Section 1 of the 1855 Act provided that the "court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States * * *." Section 2 of the 1863 Act listed "all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any contract, express or implied, with the Government of the United States * * *."

Neither of these reasons counsels against the availability of declaratory relief in Tucker Act suits. Since no performance by, or execution on, the defendant is sought in a prayer for declaratory relief, no further mechanism for the satisfaction of the plaintiff's claim is required when a court grants a declaration. See, *e.g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950); *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 263–64 (1933); E. Borchard, *Declaratory Judgments* 25–26 (2d ed. 1941). The Act states that the courts may "*declare* the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought.*" [Emphasis added.] The declaration is enough by itself. Conversely, no legislation, beyond the Declaratory Judgment Act, is needed to enable a court to grant full declaratory relief. The lack of provision in the Tucker Act for satisfaction or enforcement of judgments other than money judgments is therefore irrelevant.

Since *Jones* and *Alire* it has become axiomatic that this court has no direct power to grant specific equitable relief (injunctions, mandamus, restraining orders, and the like) on a claim, and cannot have unless Congress grants that power. See, *e.g.*, cases cited note 4 *supra*; S. Rep. No. 261, 83d Cong., 1st Sess. 2, 6 (1953); 99 *Cong. Rec.* 8943–44 (1953).[20] But a declaratory judgment is not a form of specific relief or, strictly speaking, an equitable remedy. Although considerations relevant to the issuance of various forms of equitable relief are also pertinent to the use of the Declaratory Judgment Act (see, *e.g.*, *Eccles* v. *People Bank*, 333 U.S. 426, 431 (1948); *Wacker* v. *Bisson*, 348 F. 2d 602, 607 (C.A. 5, 1965)) and the historical origins of declaratory relief are in equity (See *Borchard* at 237–41), the procedure "is neither distinctly in law nor in equity, but sui generis" (S. Rep. No. 1005, 73d Cong., 2d Sess. 6 (1934); see *Sanders* v. *Louisville & N.R.R.*, 144 F. 2d 486, 486 (C.A. 6, 1944)). The *Twin Cities* opinion oversimplified the case when it referred to the Declaratory Judgment Act as creating "a proceeding equitable in nature" and therefore precluded by the strictures of *Alire* and *Jones* against specific equitable relief.

Nor is the nature of declaratory relief such that we should put it away because of the Court's concern in *Alire* and, espe-

[20] The full effect of the second part of the Declaratory Judgment Act, § 2202 ("Further relief"), *supra*, as it pertains to this court, is obviously not now before us.

cially, *Jones* about direct coercion of public officials. Any judgmen of this court will inevitably have a restraining effect upon Government operations. This is true of money judgments even though we have no power to execute upon them and their satisfaction depends upon a Congressional appropriation of funds. See generally *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568–71 (1962). A judgment awarding money to a particular plaintiff can be authoritative information to officials that their conduct was unlawful and that, unless their position is altered, similar judgments may be rendered in the future. See *Friedman* v. *United States*, 159 Ct. Cl. 1, 11, 310 F. 2d 381, 387 (1962), *cert. denied*, 373 U.S. 932 (1963). A declaratory judgment has this same effect, whether or not affirmative relief (monetary or specific) is ever granted the plaintiff. See *Borchard* at 876, 896.

Nevertheless, the coercive effect of money and declaratory judgments differs markedly from that of the specific equitable sanctions. For the former, the impact stems from the volitional reaction of a responsible government in conforming its conduct to the pronouncements of an authoritative tribunal, not from fear of the personal consequences to the delinquent official or the use of force at the behest of the court. In contrast, specific equitable relief is directed at an identifiable res, a particular individual, or both, and usually commands obedience subject to the drastic compulsive powers possessed by the judiciary.[21] See *United States* v. *Boutwell*, 17 Wall. (84 U.S.) 604, 607 (1873); *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, 472–73 (1951) (Frankfurter J., concurring); *Land* v. *Dollar*, 190 F. 2d 366, 623 (C.A.D.C.), *cert. granted*, 341 U.S. 737 (1951) (per curiam opinion), *cert. dismissed on motion of petitioner*, 344 U.S. 806 (1952). *Compare Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475, 500–01 (1866).

The Senate Judiciary Committee recognized this difference when it supported the passage of the federal Act with the observation that "[m]uch of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments." S. Rep. No. 1005, 73d Cong., 2d Sess. 3 (1934); *cf. Zwickler* v. *Koota*, 389 U.S. 241 (1967). In our judgment, the clear distinc-

[21] In an enlightened government, direct coercion is rarely necessary "for very few officials are likely to violate their duties and exceed their powers, when these are conclusively delimited and declared by the decision of a court." *Borchard* at 876.

tion between declaratory and specific relief supports the conclusion that the *Alire-Jones* rationale should not be extended past the latter to encompass a procedure that differs little, in the nature of its restraining force, from the money judgments traditionally entered by the Court of Claims.

*2.* There are, of course, other important similarities between our present practice and declaratory relief. Because no execution can be had on our money judgments, the declaratory technique has often been compared to Tucker Act procedure. The Supreme Court relied on this analogy in upholding the constitutionality of a state's declaratory judgment act. See *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 263 (1933). As the Senate Judiciary Committee stated, "The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution." S. Rep. No. 1005, 73d Cong., 2d Sess. 5 (1934).

Moreover, pursuant to Court of Claims Rule 47(c) "a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the amount of recovery, *if any*, for further proceedings" and "the judgment on the question of the right to recover shall be final." [Emphasis added.] In a great number of cases utilizing Rule 47(c) we have, in effect, declared the liability of the defendant before it was determined whether there would be any money award at all.[22] *E.g., Shaw* v. *United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966). Like a formal declaratory judgment, a decree of liability entered under the rule is a mere statement of rights, though it too may be (but not surely) the basis for the recovery, in the future, of money.[23] In some instances, we have declared the claimant entitled, although in the very same opinion we have concluded that he could not recover any money; a recent example is *Everett* v. *United States*, 169 Ct. Cl. 11, 340 F. 2d 352 (1965), where a federal employee

[22] It is not unknown for a plaintiff with a holding of liability to find himself unable to obtain a money judgment. In contract matters he may be unable to prove damages; in personnel removal cases (civilian or military) he may have had more outside earnings than his government pay or he may be unable to prove that he was ready, willing, and able to work during his unlawful separation.

[23] The second section of the Declaratory Judgment Act, § 2202, provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." [Emphasis added.] The parallel to Rule 47(c) is obvious.

who was held illegally discharged was at the same time barred from a money judgment because he could not prove that he was able to work during the period of his wrongful removal. In practical effect *Everett* and like decisions are fully equivalent to the declaratory judgment which the present plaintiff would seek.

Again, money judgments and declaratory judgments are both res judicata in later suits between the parties. Declarations have, by statute, "the force and effect of a final judgment or decree" and, therefore, collaterally estop the litigants from retrying issues. See, *e.g.*, *Green* v. *United States*, 145 Ct. Cl. 628, 172 F. Supp. 679 (1959). The doctrine of collateral estoppel also applies to a money judgment, even though the recovery is usually limited to the amount accrued by the judgment date. See *Moser* v. *United States*, 42 Ct. Cl. 86 (1907); 49 Ct. Cl. 285 (1914), *appeal dismissed on motion of appellant*, 239 U.S. 658 (1915); 53 Ct. Cl. 639 (1918); 58 Ct. Cl. 164 (1923), *aff'd.*, 266 U.S. 236 (1924).[24]

The sum of it is that this manifold kinship between our money awards and declaratory judgments presses us to disagree strongly with the conclusion in *Twin Cities* that the Declaratory Judgment Act "concerns a proceeding * * * foreign to any jurisdiction this court has heretofore exercised." On the contrary, the "foreign" proceeding is a very close and domestic relative indeed.

*3.* Furthermore, to countenance declaratory proceedings in this court would not subject the Government to strange and alien practices. The United States has instituted many declaratory actions. See, *e.g.*, *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967); *Wyoming* v. *United States*, 310 F. 2d 566 (C.A. 10, 1962), *cert. denied*, 372 U.S. 953 (1963); *Mashunkashey* v. *United States*, 131 F. 2d 288, 290–91 (C.A. 10, 1942), *cert. denied*, 318 U.S. 764 (1943). More important, actions for declaratory relief against Government officers are often brought in the district courts (see note 2 *supra*), and the

[24] This is a famous series of cases in which the claimant sued, successively and successfully, for his pay when the military refused for a great number of years to acquiesce in this court's original ruling. The Comptroller General has adhered to the *Moser* principle, thus making it unnecessary for litigants to continually prosecute claims already adjudicated by the court. See 44 Comp. Gen. 821, 822–23 (1965) (No. B–141826); 36 Comp. Gen. 501 (1957) (No. B–6882); 36 Comp. Gen. 489, 491–92 (1957) (No. B–114422).

issues in many of those cases clearly could and do form the basis for Tucker Act suits against the United States in this court. Examples are suits relating to removal of an employee, discharge or separation of a soldier, retirement pay of officers, or court-martial orders dismissing a serviceman.

For the past decade we have consistently held that district court declaratory judgments against public officers will usually collaterally estop both the plaintiff and the United States from relitigating the issues here. (See *Technograph Printed Circuits, Ltd.* v. *United States*, 178 Ct. Cl. 543, 550–51, 372 F. 2d 969, 974–75 (1967); *Green v. United States*, 145 Ct. Cl. 628, 172 F. Supp. 679 (1959); *Edgar* v. *United States*, 145 Ct. Cl. 9, 171 F. Supp. 243 (1959); *Larsen* v. *United States*, 145 Ct. Cl. 178, 170 F. Supp. 806 (1959); *Williams* v. *United States*, 134 Ct. Cl. 763, 139 F. Supp. 951 (1956).[25] *But see Marshall* v. *Crotty*, 185 F. 2d 622, 628 (C.A. 1, 1950). *Compare O'Brien* v. *United States*, 148 Ct. Cl. 1 (1960) (laches). Thus, in actual practice the Government has long been subject to binding declaratory judgments involving certain Tucker Act causes of action.

## IV

It is implicit in what we have said that use of the Declaratory Judgment Act need not, and will not, be used to expand the classes of claims or issues which this court may consider. The Act itself states that a court may adopt the procedure only in cases "within its jurisdiction." The Supreme Court has unequivocally held that, with the enactment of the federal statute, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction". The Court said that "jurisdiction", in this context, "means the kinds of issues which give right of entrance to federal court." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).[26]

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[25] Two earlier cases to the contrary (*O'Brien* v. *United States*, 124 Ct. Cl. 655 (1953), and *Levy* v. *United States*, 118 Ct. Cl. 106 (1950), *overruled in subsequent order*, 169 Ct. Cl. 1020, 1023, *cert. denied*, 382 U.S. 862 (1965)) were disapproved in *Edgar v. United States*, *supra*, 145 Ct. Cl. at 16, 171 F. Supp. at 248.

[26] The opinion added: "Prior to that [the Declaratory Judgment] Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediate enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforce-

For this court "the kind of issue which gives right of entrance" is declared, for the most part, by our general jurisdictional statute, now 28 U.S.C. § 1491 (1964).[27] There must be a "claim" and it must be "against the United States". The cause of action has to be founded upon the Constitution, a statute, a regulation, or a contract, or be non-tortious in character. Historically, also, the area with which we have dealt has been that of controversies with a money cast—cases tied in some way to a demand or call upon the Government for the payment of money to the claimant, either because his money (or property) was wrongfully taken by (or handed over to) the United States or because the United States owes or will owe him money on account of some contract or provision of law. See *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 605–07, 372 F. 2d 1002, 1007–09 (1967); *cf Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 125, 340 F. 2d 663, 667, *cert. denied*, 381 U.S. 950 (1965); *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 167 Ct. Cl. 236, 244–45, 334 F. 2d 622, 626–27 (1964), *cert. denied*, 379 U.S. 964 (1965). But for a suit to have such a money cast does not require (as we have pointed out) that the plaintiff immediately seek a money judgment from this court or even that he ever seek such a judgment. What it does mean is that the claimant, if he does not ask for a money judgment, pray for this court's help in order to be in a position to collect money from the United States, sometime in the future. Such an action has a money cast and is money-oriented—can, in other words, properly be called a "money claim" or at least a "money-related claim" against the Federal Government—in the realistic sense that the plaintiff's declaratory judgment, if he prevails, will lead to his being able to receive money from the Government, if he chooses, perhaps immediately after the judgment or perhaps at some future time. The claim for money may not be current or immediate but it is at least potential, and the action is therefore linked to the recovery of money from the Government.

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ment of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified." 339 U.S. at 671–72.

[27] "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The present plaintiff's case will illustrate. If he receives a declaratory judgment, Colonel King will not have a money judgment from us. But his claim will nevertheless have a monetary cast. He can use his declaration, perhaps, to obtain administratively from the Army an amount equivalent to the taxes he has paid since 1959 on his retirement pay, but which he cannot recover judicially in this suit because he failed to file proper refund claims with the Internal Revenue Service. At the least his declaration will lead the Army, presumably, to change its records for the future as to the nature of his retirement and thereafter to pay him future retirement pay on the basis of disability retirement, *i.e.*, without any deduction for taxes. If the Army remains obdurate, he can use his declaration as the predicate for a further suit in this court asking a money judgment for the amounts withheld after the declaration. In short, we can properly anticipate that, if plaintiff prevails on the merits and secures a declaratory judgment, he will in the future be able to receive money from the United States to which he is entitled. On this view he plainly has a monetary claim or demand against the Government, actual and potential—a money-related claim, if you will—even though he cannot now have a money *judgment* from the court.

Another example comes from *Raydist Navigation Corp.* v. *United States, supra,* 144 F. Supp. 503, the district court decision holding declaratory relief open in a Tucker Act suit. That plaintiff's 1951 contract with the Government had been completed and the final payment made when the contracting officer requested a voluntary refund. This was not forthcoming, and the defendant deducted a sum from one of the partial payment invoices submitted by the plaintiff in connection with another, entirely unrelated, contract awarded in 1955. The court denied a motion to dismiss the plaintiff's action for a declaratory judgment, reasoning:

> Such an action is peculiarly applicable to this case as plaintiff alleges that it is engaged in contracts with other agencies of the Government, that it intends to continue to bid on such contracts, and that reopening of closed contracts permitting alleged arbitrary and unlawful deductions would seriously jeopardize the security of all contracts made with the United States or any agency thereof. [144 F. Supp. at 505–06.]

The contractor, it is clear, had a monetary claim although it did not, and could not at that time, seek a money judgment; if the court upheld its position, the defendant would no doubt discontinue deductions from payments on the unrelated contracts and credit the plaintiff with the sums already deducted. In that way the plaintiff could, and probably would, use the declaration to obtain money from the United States to which plaintiff had a legal right. Other examples, briefly, come from the civilian employee whose declaration that he was illegally discharged by the Government can aid him in obtaining reinstatement to the old post or a new federal job, and therefore a place once again on the payroll; or the serviceman whose declaration that his discharge was wrongful can likewise lead to his reinstatement or new enlistment.

All we hold today is that claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast, money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. That use of the Declaratory Judgment Act will surely not extend our jurisdiction or contravene 28 U.S.C. § 1491, *supra*. Whether there are other classes (*i.e.*, non-money-related cases) in which a declaratory proceeding can validly be offered by this court we leave open for further development. At the least, plaintiff's category falls this side of the jurisdictional boundary.

Of course, a declaratory proceeding could not be used for money-related claims which this court cannot consider. It would have made no difference, for instance, if the plaintiff in *Eastport S.S. Corp.* v. *United States*, *supra*, 178 Ct. Cl. 599, 372 F. 2d 1002, had framed a demand for a declaratory judgment, or both such a decree and a money award, instead of solely for damages. Claimants with tort claims against the Government, or other causes of actions over which we have no power, cannot evade the subject-matter limitations on our jurisdiction by refashioning their actions in the terms of a declaratory proceeding. So also, specific relief otherwise unavailable here (injunction, mandamus, specific performance, prohibition, orders *in rem*) cannot be obtained in violation of the *Alire-Jones* doc-

trine.[28] Nor can a claim which is not in reality against the Government be camouflaged as such in the guise of a declaratory proceeding. For a money-related claim against the United States, all that can happen under the Declaratory Judgment Act as applied in this court is that the plaintiff's right, if it is within our competence, will be recognized "even though no immediate enforcement of it [is] asked." *Skelly Oil Co.* v. *Phillips Petroleum Co., supra,* 339 U.S. at 671.

We are quite aware that the application of the remedy may raise novel, and perhaps difficult, issues relating to the statutes of limitations (see, *e.g.*, note 6 *supra*); to exhaustion of administrative determinations (*c.f., e.g., Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 545 n. 5 (1946), *reversing sub nom. Waterman S.S. Corp* v. *Land*, 151 F. 2d 292 (C.A.D.C., 1945); *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C., 1961)); to piecemeal litigation of causes of action, especially in contract cases (see *Nager Elec. Co.* v. *United States*, 177 Ct. Cl. 234, 245–46, 368 F. 2d 847, 855–56 (1966), and cases cited); and, more generally, to the determination, when the petition is for declaratory relief, whether the matter is a justiciable controversy within our jurisdiction.

But these problems are by no means insuperable, and we will face them as they arise without attempting now to lay down standards for the application of the Act that will cover all cases at all times. Our endeavor to accommodate the declaratory proceeding to our practice will be aided not only by the large body of decisional law in other courts but by the discretion which Congress has distinctly allowed the federal courts in employing this remedy. As the Supreme Court emphasized, after capsuling the conventional blackletter rules governing declaratory relief:

> "[W]hen all of the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in

[28] As already indicated (note 20 *supra*), we do not now reach or consider any right this court may have to give specific relief under 28 U.S.C. § 2202 as ancillary to a declaration previously given.

> the cases for which it was designed, they must be alert to avoid imposition upon this jurisdiction through obtaining futile or premature interventions, especially in the field of public law. [*Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 243 (1952).]

Scores of decisions prove that this power to refuse declaratory relief as a matter of discretion is not empty. We too can exercise that authority.

V

Because the term "any court of the United States" in the operative clause of the Declaratory Judgment Act strongly suggests the inclusion of the Court of Claims and because we believe that declaratory relief is consistent with the concept of money-judgment jurisdiction established by *Alire* and *Jones*, that it need not be used to expand our jurisdiction, and that it would not result in the exposure of the sovereign to an alien remedy, we do not require, as the court in *Twin Cities* did, a totally unambiguous Congressional statement vesting us with the authority to grant declaratory relief against the United States. See *Raydist Navigation Corp.* v. *United States*, *supra*, 144 F. Supp. at 505; *cf. Unger* v. *United States*, *supra* note 11, 79 F. Supp. at 283–84. We think it suffices if Congress failed to give any meaningful indication that this reform—introduced many years after the Tucker Act and in language covering our court and our cases—should not be applicable. *Cf. American-Foreign S.S. Corp.* v. *United States*, *supra* note 10, 291 F. 2d at 604. As we shall now point out, the legislative record is free of any such purpose.

*1.* The first proposal for a federal declaratory judgment statute was introduced in 1919. From then until the Act was passed in 1934, the House Judiciary Committee held short hearings on two occasions [29] and issued brief favorable reports seven times; [30] the House debated the issue in six different

[29] *Hearing on Legislation Recommended by the American Bar Ass'n Before House Comm. on the Judiciary*, 67th Cong., 2d Sess., ser. 25 at 5–16 (1922); *Hearing on Declaratory Judgments Before House Comm. on the Judiciary*, 69th Cong., 1st Sess., ser. 12 (1926).

[30] H.R. Rep. No. 1441, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 928, 69th Cong., 1st Sess. (1926); H.R. Rep. No. 288, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 366, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 94, 71st Cong., 1st Sess. (1929); H.R. Rep. No. 627, 72d Cong., 1st Sess. (1932); H.R. Rep. No. 1264, 73d Cong., 2d Sess. (1934).

years,[31] passing a declaratory judgment bill four times.[32] Although Senate hearings were held in 1927,[33] the Senate Judiciary committee did not report until 1934.[34] In that year, the Senate first passed its own version of the legislation and then adopted the House-passed bill.[35]

The focus of the discussions in the hearings, reports, and debates was on the constitutionality of the bill, its res judicata implications, and whether declaratory relief should be allowed unless all interested parties consented to the procedure. Nowhere is there any specific consideration of the applicability of the remedy to the Court of Claims or to Tucker Act litigation. Though a number of statements made in other contexts could be interpreted as bearing on the issue, all are, at best, ambiguous.

First, in the reports and during floor debate, the legislators referred to the procedure as applicable in the "Federal courts", a term intimating inclusion of every court in the federal judicial system. See, *e.g.*, S. Rep. No. 1005, 73d Cong., 2d Sess. 1 (1934); 69 *Cong. Rec.* 1681, 1685, 1686 (1928) (remarks of Representatives Celler, Dyer, and Newton); 78 *Cong. Rec.* 10565 (1934) (remarks of Senator Robinson). Second, the expected benefits of the Act were illustrated by the citation of cases from the British and New York experience with similar procedures, and those cases included claims against a government. See *Hearing on Legislation Recommended by the American Bar Ass'n Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess., ser. 25, at 10 (1922) (testimony of A.B.A. witness W. H. Taft); 69 *Cong. Rec.* 1687, 2029 (1928) (remarks of Representatives Seller and La Guardia). See also *Borchard* at 854. Third, the Senate report, as already indicated, drew an analogy between Court of Claims money judgments and declaratory judgments when it said, "The decisions of the United States Court of Claims are essentially declaratory in nature * * *." S. Rep. No. 1005, 73d Cong. 2d Sess. 5 (1934). Fourth,

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[31] 66 *Cong. Rec.* 408–11, 4874 (1925); 67 *Cong. Rec.* 9546 (1926); 69 *Cong. Rec.* 1680–88, 2025–32 (1928); 75 *Cong. Rec.* 14091 (1932); 76 *Cong. Rec.* 697–98 (1932); 78 *Cong. Rec.* 8224 (1934).

[32] 67 *Cong. Rec.* 9546 (1926); 69 *Cong. Rec.* 2032 (1928); 76 *Cong. Rec.* 697–98 (1932); 78 *Cong. Rec.* 8224 (1934).

[33] *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Committee on the Judiciary*, 70th Cong., 1st Sess. (1929).

[34] S. Rept No. 1005, 73d Cong., 2d Sess. (1934).

[35] See 78 *Cong. Rec.* 10564–65, 10919 (1934).

the Committee's reference to the "United States Court of Claims" could be construed as an implicit recognition that the court was to be included in the term "the courts of the United States" as used in the 1934 Act.

On the other side, during a 1925 colloquy on the House floor, Congressman Montague (then chairman of the Judiciary Committee) stated that the "act applies to Federal district courts and the courts of the District of Columbia." 66 *Cong. Rec.* 4874 (1925). Further, according to *Williams* v. *United States*, 289 U.S. 553 (1933), the Court of Claims was not a constitutional (Article III, Section 2) court;[36] the Congressional concern with the constitutionality of the Act was phrased entirely in terms of the consistency of the procedure with the exercise of Article III judicial power; since no reference was made to the difference in constitutional problems with respect to legislative courts, a tenuous argument could be drawn that the Congress did not intend to include such courts. For a discussion of constitutionality, see, *e.g.*, *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. 61–81 (1929) (testimony of Representative Denison and memorandum of Professor Borchard).

Individually and collectively these scattered excerpts and thin inferences fail to provide a sound foundation for concluding that Congress either did or did not intend to authorize the granting of declaratory relief by the Court of Claims. The truth seems to be that the issue simply was not within the express legislative contemplation.[37]

Scant attention has been paid by the secondary legal authorities to this precise question of Congressional intent. Most merely report and accept as law *Twin Cities* and its offspring. See, *e.g.*, 6A *J. Moore's Federal Practice*, ¶ 57.02 [4], at 3011 & nn. 8–9 (2d ed. 1966); *Developments in the Law—Declaratory Judgments*, 62 Harv. L. Rev. 787, 824 n.284 (1949). How-

[36] But, as mentioned above, the asserted legislative status of the Court of Claims did not prevent the Supreme Court from terming it "a court of the United States". *Ex parte Bakelite Corp.*, *supra*, 279 U.S. at 455.

[37] The 1935 amendment (Revenue Act of 1935, ch. 829, § 405, 49 Stat. 1014, 1027) excluding disputes "with respect to taxes" provides even less guidance in determining the scope of the Act in non-tax matters. See S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 1885, 74th Cong., 1st Sess. 13 (1935); 79 *Cong. Rec.* 13227–28 (1935); 13 *Tax Magazine* 539 (1935) (reprinting the Justice Department's memorandum suggesting the change); *Borchard* at 850–57.

ever, Professor Edwin Borchard, who was the chief extra-Congressional sponsor of the federal Act,[38] said in his treatise that the statute does not permit declarations "outside the terms of the Tucker Act" but does authorize such judgments "within the permitted limits" of the Tucker Act. *Borchard* at 373. We understand this to mean that he disputed any assertion that declaratory relief may never be granted in Tucker Act suits. He seemed to interpret *Twin Cities* and other such decisions as holding only that declaratory judgments are unavailable in cases otherwise nonjusticiable or outside the general jurisdiction of this court.

*2.* The 1948 revision and codification of the Judicial Code added a new Section 451 expressly including the Court of Claims in the term "court of the United States" as used in Title 28. Act of June 25, 1958, ch. 646, § 451, 62 Stat. 869, 907 (now 28 U.S.C. § 451 (1964)). Since the Declaratory Judgment Act, as revised, allows "any court of the United States" to grant declaratory relief, the 1948 Code undeniably indicates, if its phrasing is taken at face value, that the Court of Claims possesses the power to issue a declaratory judgment.

The hearings, reports, and floor debates preceding the 1948 enactment show no recognition that Section 451 has that result, whether the effect be repetition of, or clarification of, or change in the 1934 Act.[39] Nor is there evidence of an intent to ratify or overturn the prior judicial construction of the term "court of the United States" as used in the Declaratory Judgment Act.[40] *Compare Western Pac. R.R.* v. *Western Pac. R.R.*, 345 U.S. 247, 253–57 (1953).

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[38] See, *e.g.*, H.R. Rep. 1264, 73d Cong., 2d Sess. 2 (1934); 69 *Cong. Rec.* 1687 (1928) (remarks of Representative Celler); *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Comm. on the Judiciary*, 70th Cong. 1st Sess. 15–22, 70–81 (1929) (testimony and statement of Professor Borchard).

[39] *See Hearings on H.R. 3214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. (1948); *Hearings on Revisions of Titles 18 and 28 of the United States Code Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. (1947); S. Rep. No. 1559, 80th Cong., 2d Sess. (1948); H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947). The House and Senate debates are reprinted in *U.S. Code Cong. Serv., New Title 28—United States Code* 1986–2040 (1948).

[40] In 1954 Congress made the Act applicable to the district court for Alaska (then a territory) after *Reese* v. *Fultz*, 96 F. Supp. 449 (D. Alaska 1951), had held it inapplicable. Act of Aug. 28, 1954, ch. 1033, 68 Stat. 890. To our knowledge, the Congress has never had its attention called to the *Twin Cities* line of cases.

The reviser's notes, which are an authoritative aid for statutory construction (*Western Pac. R.R.* v. *Western Pac. R.R.*, *supra*, 345 U.S. at 254–55), do not refer to the Court of Claims or to the Tucker Act in the comments on Sections 2201–02 (the Declaratory Judgment Act), and they state only that Section 451 was "inserted to make possible a greater simplification in consolidation of the provisions of this title" 28 U.S.C. at 5913, 6026–27 (1964). This notation, though persuasive, does not, in itself, demonstrate that a clarification or change was not made in existing law. It is true that, in the preparatory stages of the 1948 codification, "great care [was] taken to make no changes in existing law which would not meet with unanimous approval." S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948). However, for the reasons stated in Part III and IV of this opinion, we do not think that a change, if any, made by Section 451 would be considered controversial. *Compare, e.g., Fourco Glass* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227–28 (1957); *Western Pac. R.R.* v. *Western Pac R.R.*, *supra*, 345 U.S. at 256–57; *United States* v. *National City Lines*, 337 U.S. 78, 80–84 (1949); *Ex parte Collett*, 337 U.S. 55, 61–71 (1949). By far the most likely reason for the lack of further comment on Section 451 is that the drafters assumed that it merely restated the obvious and accepted meaning, in all contexts, of the phrase "court of the United States".

*3.* We are left with the clear statement in the 1948 revision that the Court of Claims is automatically included in the enabling clause of the Declaratory Judgment Act, set against a backdrop of comparable phraseology in the 1934 Act that seems literally to include the court but had been construed in favor of exclusion (without Congressional awareness of that interpretation). Because of our disagreement with the premises of *Twin Cities* (see Parts III and IV, *supra*), we read the original 1934 Act as adequately authorizing the court to render declatory judgments. But we note, in connection with the 1948 revision, that in circumstances even less compelling the Supreme Court has held that "[t]he revised form * * * is to be accepted as correct, notwithstanding a possible discrepancy" with the pre-existing legislation. *Continental Cas. Co.* v. *United States*, 314 U.S. 527, 530 (1942); see *United States* v. *Bowen*, 100 U.S. 508, 513 (1879). On both bases, we shall no longer follow *Twin Cities*.

## VI

Having concluded that the court is empowered to issue declaratory judgments, we turn to the second question now before us: the applicability of this procedure to Colonel King's claim that, by the capricious action of the Secretary of the Army, he was retired for longevity rather than physical disability and that his records should have been corrected to indicate retirement for the latter.

The Government does not (and could not) intimate at this stage that this is an improper case for declaratory relief under the general rules summarized in *Public Serv. Comm'n* v. *Wycoff Co., supra, 344 U.S. at 242–43*, and *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937). Suits for the declaration of a plaintiff's right to have his military records corrected are a relatively common-place occurrence in the federal district courts. See, *e.g., Van Bourg* v. *Nitze*, 388 F. 2d 557 (C.A.D.C., 1967), and other cases cited note 2 *supra*.

Nor is there any doubt that the subject matter of the petition is within our jurisdiction. Over the years we have decided innumerable disputes over disability retirement ratings and the actions of military review and record-correction boards.[41] As shown in Part IV *supra* the present case fits snugly into the traditional class of money claims against the Federal Government. So far as now appears, we hold, this is a proper case in which to consider the award of a declaration. Naturally, we do not preclude the court, if the circumstances as they are developed direct that course, from ultimately declining a declaration as a matter of discretion.

The defendant does contend that this is a suit "with respect to federal taxes" and thus excluded from the Declaratory Judgment Act. Quite obviously the plaintiff is interested in the tax consequences of his retirement rating. But that does not make it an action "with respect to federal taxes." The determination which plaintiff requests is not a determination of his tax liability; the interpretation and application of Int. Rev. Code of 1954, § 104(a) (4) (allowing exclusion of allow-

[41] See *e.g., Hutter* v. *United States*, 170 Ct. Cl. 517, 345 F. 2d 828 (1965); *Merriott* v. *United States*, 163 Ct. Cl. 261 (1963), *cert. denied*, 379 U.S. 838 (1964); *Egan* v. *United States*, 141 Ct. Cl. 1, 158 F. Supp. 377 (1958); *Freidman* v. *United States*, 141 Ct. Cl. 239, 158 F. Supp. 364 (1958); *Capps* v. *United States*, 133 Ct. Cl. 811, 137 F. Supp. 721 (1956); *Lemly* v. *United States*, 109 Ct. Cl. 760, 75 F. Supp. 248 (1948), and cases cited.

ances for armed-services connected injuries and sicknesses) is totally irrelevant to the questions he seeks to place before us.[42] See *Prince* v. *United States*, *supra*, 127 Ct. Cl. at 617, 119 F. Supp. at 423–24. The only questions he presents, or need present, relate to his retirement from the Army, and those are the only issues with which this court will treat in its further proceedings in this case. In the circumstances, Colonel King's tax motives have absolutely no bearing on the application of the declaratory remedy. See *Stern & Co.* v. *State Loan & Fin. Co.*, 205 F. Supp. 702, 706 (D. Del. 1962). *Compare Wilson* v. *Wilson*, 141 F. 2d 599 (C.A. 4, 1944).[43]

Defendant's motion to dismiss the petition is denied. Plaintiff is granted permission to amend his petition, within 30 days of the date hereof, to seek explicitly a declaration of his right to be retired for disability and to have his military records changed. The case is then to be returned to the trial commissioner for further proceedings on the prayer for declaratory relief.

---

[42] There is no question that § 104(a)(4) of the Internal Revenue Code would exempt his retirement pay from income tax if he were held retired for disability. *Freeman* v. *United States*, 285 F. 2d 66 (C.A. 9, 1959); *McNair* v. *Commissioner*, 250 F. 2d 147 (C.A. 4, 1957); *Prince* v. *United States*, *supra*, 127 Ct. Cl. 612, 617, 119 F. Supp. 421, 423–24; Treas. Reg. § 1.104–1(e).

[43] In *Stern & Co.* the plaintiff sought a judgment declaring that the defendant had breached its contract to purchase plaintiff's stock by allocating an excessive portion of the purchase price to plaintiff's covenants not to compete. The Commissioner of Internal Revenue, on the basis of defendant's allocation, had reopened plaintiff's income tax returns and asserted that that portion of the sales price constituted ordinary income. Although the court stayed the suit pending proceedings in the Tax Court, it held the tax motives irrelevant because the branch could be determined by reference solely to the contract and because a determination of the propriety of the allocation with respect to the contract would not bind the Commissioner in determining the issue with respect to the tax laws. Subsequently the plaintiff received an order of nonliability from the Tax Court and returned to the district court; where he succeeded in obtaining damages for breach of contract. See *Sterns & Co.* v. *State Loan & Fin. Corp.*, 238 F. Supp. 901 (D. Del. 1965).

In contrast to the *Stern* case, *Wilson* involved a suit against four persons (including plaintiff's wife and daughter) allegedly owning interests with him in a business partnership and against the Commissioner of Internal Revenue for a declaration of the interest the supposed partners owned and of the right to have taxes assessed according to the court's determination of the ownership interests. The four private parties did not dispute plaintiff's allegations as to their interests, thus leading the court to the conclusion that the only controversy in the suit was between the plaintiff and the Commissioner over plaintiff's tax liability, clearly a controversy "with respect to federal taxes."

## AMENDMENT TO PETITION

Pursuant to the Court's decision rendered on February 16, 1968 the petition filed herein on July 26, 1965 is amended as follows:

1. Paragraph 2 is amended by adding after the comma at the end of the second (2nd) line and before the word "and" at the beginning of the third (3rd) line: "and Section 2201, et seq".

2. As a new Paragraph 19 the following is added:

> 19. There is an actual and substantial controversy existing between the parties within the jurisdiction of this Court as to whether plaintiff should have been retired by reason of physical disability rather than for years of service and whether the failure of the Secretary of the Army, acting by and through the various administrative forums as alleged, to have retired plaintiff by reason of physical disability rather than for years of service, was erroneous, invalid, arbitrary, capricious, not based on substantial evidence, contrary to the evidence, and contrary to law and regulation.

3. The prayers for relief as set forth on Page 6 of the petition are amended by striking the existing prayers and substituting the following:

WHEREFORE, plaintiff prays:

1. That the Court enter a judgment declaring the decisions of the Secretary of the Army, acting by and through the administrative forums as alleged, determining that plaintiff was fit for general military service at the time of his retirement for years of service on July 31, 1959 were in error, invalid, arbitrary, capricious, not supported by substantial evidence, and contrary to the evidence, governing law and regulations.

2. That the Court declare plaintiff is and was at all times since July 31, 1959 unfit for general military service by reason of physical disability; that said disabilities were permanent in nature; that the degree of severity of plaintiff's disabilities was ratable at a combined rating of 75% under the Veterans Administration *Schedule for Rating Disabilities*; that the failure of the Secretary of the Army, acting by and through the ad-

ministrative forums as alleged, to retire plaintiff by reason of physical disability rather than for years of service was in error, invalid, arbitrary, capricious, not supported by substantial evidence, and contrary to the evidence, governing law and regulation; and that plaintiff should have been retired by reason of physical disability as provided by Chapter 61, Title 10, United States Code, Sections 1201 et seq, as a Colonel, Army of the United States, with a combined rating of 75% and 30 years of service for basic pay purposes, as well as retirement purposes.

3. That the Court declare plaintiff is and was at all times since July 31, 1959 entitled to have been retired by reason of physical disability under the provisions of 10 USC 1201, et seq; that the Secretary of the Army, acting by and through the Army Board for Correction of Military Records, should have corrected plaintiff's records under the provisions of 10 USC 1552 to show his retirement by reason of physical disability on July 31, 1959, ratable at 75% under the Veterans Administration *Schedule for Rating Disabilities* and to have paid plaintiff all monies due pursuant to said statute; and that the failure of the Secretary of the Army to have corrected plaintiff's records to show him retired by reason of physical disability rather than for years of service was in error, invalid, arbitrary, capricious, not supported by substantial evidence, and contrary to the evidence, governing law and regulations.

4. That the Court enter a judgment against defendant for physical disability retirement pay equal to 75% of the pay of a Colonel with over 30 years of service, from July 31, 1959, less such net retirement pay for years of service heretofore paid to plaintiff, the amount to be determined under Rule 47c.

5. That the Court grant such other and further relief as may be deemed just and proper.

NEIL B. KABATCHNICK,
*910 17th Street, N.W.,*
*Washington, D.C. 20006,*
*Attorney for Plaintiff.*

RICHARD H. LOVE,
*Of Counsel.*

## ANSWER TO THE FIRST AMENDED PETITION, March 29, 1968

For its answer to the first amended petition defendant admits, denies and alleges, as follows:

1. to 18. Inclusive. Defendant reasserts the admissions, denials and allegations contained in paragraphs 1 to 18, inclusive of its answer to the original petition.

19. Denies the legal conclusions that the controversy existing between the parties is within the jurisdiction of this Court. The remaining allegations of paragraph 19 are admitted.

20. The prayers for relief as set forth on page 6 of the original petition as amended by paragraph 3 of the amendment to the petition are not deemed to be allegations of material fact which defendant is required to affirm or deny.

21. Except as herein admitted, denied or otherwise qualified, defendant denies all allegations contained in the petition.

WHEREFORE, defendant demands that the petition be dismissed, and that defendant be granted such other and further relief as may be just and proper.

EDWIN L. WEISL, Jr.,
*Assistant Attorney General.*

ARTHUR E. FAY,
*Attorney, Civil Division*
*Department of Justice*

In the Supreme Court of the United States

No. 672— , October Term, 1968

UNITED STATES, PETITIONER

*v.*

JOHN P. KING

## ORDER ALLOWING CERTIORARI

Filed January 13, 1969

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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Statutes—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. KING

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the decision of the United States Court of Claims in this case.

## OPINION BELOW

The opinion and order of the Court of Claims (App. *infra*, pp. 1A–30A) are reported at 182 Ct. Cl. 631, 390 F. 2d 894.

## JURISDICTION

The opinion and order of the Court of Claims were entered on February 16, 1968. The government's timely motion for reconsideration was denied without opinion on June 14, 1968. By orders entered on September 5, and October 3, 1968, the Chief Justice extended the time for filing this petition respectively to and includ-

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ing October 11, and October 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether the Declaratory Judgment Act, 28 U.S.C. 2201–2202, grants the Court of Claims jurisdiction to enter declaratory judgments against the United States.

## STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1491 provides:

> § 1491. Claims against United States generally * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * * *

The Declaratory Judgment Act, 28 U.S.C. 2201 provides:

> § 2201. Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

Respondent, Colonel John P. King, was retired from the Army in 1959 for longevity. Subsequently, the Secretary of the Army, acting through the Physical Disability Review Board and the Board for Correction of Military Records, rejected respondent's contention that he should have been retired for disability. Although respondent is entitled to retirement pay of seventy-five percent of his basic pay as a colonel regardless of the basis for his retirement,[1] the Secretary's action denied him the exemption from income taxation that Section 104(a)(4) of the Internal Revenue Code of 1954 allows pensions based on a service-connected disability. (App. 2A.)

Respondent brought this action in the Court of Claims, alleging that "[t]he action of the Secretary of the Army in failing to grant plaintiff physical disability retirement was arbitrary, capricious, not supported by the evidence and contrary to law and regulation." He sought a "judgment against defendant for physical disability retirement with retired pay equal to 75% of the pay of a Colonel * * * less such net retirement pay for years of service heretofore paid to plaintiff," *i.e.* for an amount equal to (App. 2A) "the federal taxes assessed on his retirement pay".

The Court of Claims accepted (*id.* at 2A–3A) the government's contention that this was "basically a claim for a refund of taxes" and was, therefore, barred by respondent's failure to allege the filing of a timely

[1] *Compare* 10 U.S.C 391., 3991 *with* 10 U.S.C. 1201, 1401.

claim for refund with the Internal Revenue Service.[2] See 26 U.S.C. 7422(a). However, rather than dismissing the complaint, the court issued an order (App. 3A) "suggesting that the sole relief which plaintiff could now possibly have from this court would be a declaration of his right to be retired for physical disability and to have his records changed accordingly" and requested briefs on the applicability of the Declaratory Judgment Act, 28 U.S.C. 2201–2202, to (App. 2A, n. 1) "this court and this case." After such briefs were filed, and the point argued, the Court of Claims held that it had the power to grant declaratory judgments against the United States. Rejecting government contentions that its jurisdiction is limited to the granting of money judgments, and that the Declaratory Judgment Act does not apply to suits against the United States, the Court of Claims overruled a line of its own decisions beginning with *Twin Cities Properties, Inc.* v. *United States,* 81 Ct. Cl. 655, and held (App. 22A):

> * * * that claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast, money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. * * *

The court denied the motion to dismiss and granted respondent leave to amend his petition (App. 30A)

[2] Respondent in fact had not filed such a claim (App. 2A).

"to seek explicitly a declaration of his right to be retired for disability and to have his military records changed." The case was "then to be returned to the trial commissioner for further proceedings."

## REASONS FOR GRANTING THE WRIT

The Court of Claims has decided an important jurisdictional issue in a manner that materially enlarges the subject matter jurisdiction which it has traditionally exercised under the Tucker Act, 28 U.S.C. 1491. Its holding, besides overruling a line of its own cases that dates to the year after the adoption of the Declaratory Judgment Act, is contrary to numerous decisions of this Court and courts of appeals, which limit Tucker Act jurisdiction to claims for actual money damages against the United States. It is equally inconsistent with decisions of seven courts of appeals holding that declaratory relief is not available against the United States. The ruling has wide implications, as is demonstrated by the several situations where claimants in the Court of Claims are already seeking declaratory judgments.

1. The Declaratory Judgment Act was adopted in 1934, 48 Stat. 955, to assist "in avoiding the necessity * * * of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages."[3] It granted the federal courts the power "[i]n cases of actual controversy" to issue declaratory judgments

[3] S. Rep. No. 1005, 73d Cong., 2d Sess. 2; see, also, H. Rep. No. 1264, 73d Cong., 2d Sess. 2.

"whether or not further relief is or could be prayed." The following year, Congress, in Section 405 of the Revenue Act of 1935, 49 Stat. 1027, amended the Act to restrict its application to an "actual controversy (except with respect to federal taxes)" in order to avoid "a radical departure from" the established methods of determining tax controversies. See S. Rep. No. 1240, 74th Cong., 1st Sess. 11.

The act was not intended, however, to enlarge the subject matter jurisdiction of the federal courts. "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240. It created a new remedy for cases "otherwise cognizable by the federal courts." *Ibid.*, quoting from *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 264; see, also, *United States* v. *West Virginia*, 295 U.S. 463, 475. In fact, the Declaratory Judgment Act now expressly provides that a federal court may grant such a judgment only "[i]n a case of actual controversy *within its jurisdiction*, except with respect to Federal taxes" (emphasis supplied).

In terms of the present case, this means that the essential point of reference is the part of the Judicial Code which defines the jurisdiction of the Court of Claims. That jurisdiction is founded on the Tucker Act, now 28 U.S.C. 1491:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

States, or for liquidated or unliquidated damages in cases not sounding in tort.[4]

As the tribunal created "primarily to relieve the pressure on Congress caused by the volume of private bills," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 552, the court's jurisdiction has always been defined in terms of cases involving a "claim" against the federal government.[5] This Court has repeatedly held that this statutory formulation limits the jurisdiction of the Court of Claims to cases involving a demand for a money judgment. "From the beginning it has been given jurisdiction only to award damages * * *." *Glidden Co.* v. *Zdanok, supra*, 370 U.S. at 557. Thus the Court of Claims may not issue mandamus,[6] may not determine an equitable claim for money,[7] may not remand a case to an administrative agency,[8] may not direct specific performance,[9] and may not even grant nominal damages.[10]

Given this background, one would think it beyond dispute that the Court of Claims may not grant declaratory relief to a claimant who cannot assert a

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[4] The Judicial Code also gives the Court of Claims jurisdiction of matters arising from "any unsettled account" of federal officers or contractors, 28 U.S.C. 1494, and in a variety of special situations not pertinent here. 28 U.S.C. 1495–1499.

[5] *E.g.*, Section 1 of the Act of February 24, 1855, 10 Stat. 612; Section 2 of the Act of March 3, 1863, 12 Stat. 765.

[6] *United States* v. *Alire*, 6 Wall. 573.

[7] *Bonner* v. *United States*, 9 Wall. 156.

[8] *United States* v. *Jones, Receiver*, 336 U.S. 641.

[9] *United States* v. *Jones*, 131 U.S. 1.

[10] *Grant* v. *United States*, 7 Wall 331, 338; *Marion & Rye Valley Railway Co.* v. *United States*, 270 U.S. 280; *Norte* v. *United States*, 294 U.S. 317, 327; *Perry* v. *United States*, 294 U.S. 330, 355.

right to receive money damages from the United States. Indeed, the Court of Claims itself so held just two years ago. See *Rolls-Royce Ltd., Derby, England* v. *United States*, 176 Ct. Cl. 694, 364 F. 2d 415. The same result has been reached in four courts of appeals, which have held that declaratory judgments may not be rendered in cases involving the sort of controversy that might be asserted under the Tucker Act but for a want of a claim of money damages. See *Blanc* v. *United States*, 244 F. 2d 708 (C.A. 2); *Anderson* v. *United States*, 229 F. 2d 675 (C.A. 5); *Powers* v. *United States*, 218 F. 2d 828 (C.A. 7); *Di Benedetto* v. *Morgenthau*, 148 F. 2d 223 (C.A.D.C.); *Clay* v. *United States*, 210 F. 2d 686 (C.A.D.C.).

Here, however, the Court of Claims has gone beyond that barrier. It has used the Declaratory Judgment Act as a bridge for the exercise of jurisdiction in a case where it cannot render a money judgment, and, in taking this novel step, it has contravened two specific proscriptions upon its jurisdiction. For, in this case a declaration of rights: (1) would result in a declaratory judgment in what is (see App. 2A–3A) "basically a claim for a refund of taxes", notwithstanding the express language of the statute forbidding declaratory relief "with respect to Federal taxes";[11] and (2) would, if favorable to respondent,

[11] Compare *Wilson* v. *Wilson*, 141 F. 2d 599 (C.A. 4), where the court of appeals held that the district court is without jurisdiction to declare the relative rights of persons alleged to own interests in a partnership because the only reason for the suit was, and its only practical impact would be on, federal tax liabilities.

require (see App. 20A–21A) a change in respondent's military records, in practical effect the sort of mandatory order to a government agency forbidden by the cases.

2. Established concepts of sovereign immunity forbid the federal courts to hear suits against the United States unless there has been a clear waiver of the immunity. See, *e.g.*, *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371; *Lynch* v. *United States*, 292 U.S. 571, 581–582. Waivers of that immunity are ordinarily cast in explicit and unmistakable terms—as in the Tucker Act, *supra*, and the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671–2680.

No such explicit waiver may be found in the Declaratory Judgment Act. On its face, that statute is only what the Congress called it in adding the clause barring declaratory judgments in federal tax controversies: "a procedure designed to facilitate the settlement of private controversies." See S. Rep. No. 1240, *supra* at 11. As the Court of Claims itself reasoned when it held in 1935 that the Declaratory Judgment Act does not apply to the Court of Claims (*Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655, 658):

> If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature

and foreign to any jurisdiction this court has heretofore exercised.

Since that decision, the courts of appeals in seven circuits have considered whether the Declaratory Judgment Act applies in suits against the United States. They have all agreed that it does not. See, *e.g.*, *Stout v. United States*, 229 F. 2d 918, 919 (C.A. 2), certiorari denied, 351 U.S. 982; *Wilson* v. *Wilson*, *supra* (alternative holding); *Anderson* v. *United States*, 229 F. 2d 675, 677 (C.A. 5) (claim to condemned land); *Powers* v. *United States*, *supra*; *Love* v. *United States*, 108 F. 2d 43, 50 (C.A. 8), certiorari denied, 309 U.S. 673; *Wells* v. *United States*, 280 F. 2d 275, 277 (C.A. 9), *Di Benedetto* v. *Morgenthau*, *supra*; cf. *Gibson* v. *United States*, 161 F. 2d 973, 974 (C.A. 6) (dictum).

All of these cases could have been said to have "a money cast," to use the formula the Court of Claims derived in this case. *Powers*, in the Seventh Circuit, indeed involved a question of the retirement status of an Army officer. *Wells*, the Ninth Circuit decision, expressly rejected the contention that the Tucker Act contains the necessary waiver of sovereign immunity. And all made clear the view that the limited waiver of immunity provided in the Tucker Act stops short of allowing the issuance of declaratory judgments in suits against the United States.

3. The conflict between the Court of Claims and the several courts of appeals over the authority of the federal courts to issue declaratory judgments in suits against the United States should be resolved by this Court. If the decision below is permitted to stand, the

Court of Claims will proceed to hear on the merits actions for declaratory judgments in situations where, as the circuits have held, the district courts have no jurisdiction under a substantially similar statutory structure.

Moreover, unless the Court undertakes to limit the Court of Claims to what we believe to be its proper powers, that court will continue to exercise jurisdiction in a broad variety of cases not involving claims for money damages. This is demonstrated by several cases where the rule of the present case is now being applied.

One, *Paulsen* v. *United States*, Ct. Cl. No. 327–67, involves a claim that the plaintiff was improperly placed on involuntary sick leave by the government agency for which she worked. Even though the Court of Claims seemed to agree with the government's position that a claim for sick leave cannot be converted into money damages, it has issued an order allowing the plaintiff to avoid dismissal by amending her complaint to seek a judgment declaring that the agency's action was unlawful.

A second case, *Wilkerson* v. *United States*, Ct. Cl. No. 137–65, was thought to have become moot when a discharged electrician's mate who had brought a backpay action died, having worked between his discharge and his death for a civilian employer at a wage greater than his military salary. The Court of Claims, however, affirmed an order of a Commissioner that denied the government's motion for summary judgment, and suggested that the plaintiff's widow, who had been substituted as plaintiff in her capacity

as administratrix, might amend to seek a declaration of her rights to widow's benefits, a question not before in issue.

In three cases [12] involving claims that shipbuilding subsidies awarded by the Maritime Subsidy Board were too low, the plaintiffs have pleaded, in the alternative, for a judgment declaring that they are entitled to an evidentiary hearing before the administrative agency with discovery of certain government cost estimates.[13] In view of the decision in the present case, the government has not moved to strike that claim.

*Paulsen* and *Wilkerson* obviously present circumstances where the Court of Claims could not grant a money judgment, and, without the asserted power to issue declaratory relief, would have no jurisdiction. For example, the correct course in *Paulsen*, as in the present case, would have been to institute an injunctive action in the district court. Wilkerson's widow, on the other hand, should have been required to apply to the Navy for those widow's benefits to which she thought herself entitled. And in the ship subsidy cases, a judgment denying damages but declaring that there should have been an evidentiary hearing would essentially constitute a remand by the Court of Claims to the administrative agency; relief

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[12] *American Export Isbrandtsen Lines, Inc.* v. *United States*, Ct. Cl. No. 75–68; *American President Lines, Ltd.* v. *United States*, Ct. Cl. No. 55–68; *Delta Steamship Lines, Inc.* v. *United States*, Ct. Cl. No. 74–68.

[13] Counsel for those plaintiffs appeared below as *amicus* in support of respondent. (See App. 3A.)

that hitherto has been thought possible only through application to a district court.

Other examples of the way in which the Court of Claims has enlarged its jurisdiction are readily apparent. For example, if the present case is, as the Court of Claims asserts (App. 29A–30A), not a tax case because it does not involve "the interpretation and application of" the Internal Revenue Code, then there will be a large number of similar controversies where it might exercise jurisdiction even though the only "money east" of the controversy would be in federal tax liabilities. One such case, for example, would have been *Wilson* v. *Wilson, supra,* where what the parties sought was a judgment declaring partnership rights under state law, from which federal tax consequences would result.

In any of these situations, and no doubt in others as well,[14] the Court of Claims will continue to apply its own expanded view of its subject matter jurisdiction unless this Court grants review.

---

[14] Numerous controversies might arise in the administration of federal contracts—as with respect to a particular decision of the contracting officer—that, while not giving rise to a ripe claim of money damages because the contract is not yet completed, could be brought to the Court of Claims by a demand for a declaratory judgment.

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## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
EDWIN L. WEISL, JR.,
*Assistant Attorney General.*
HARRIS WEINSTEIN,
*Assistant to the Solicitor General.*
JOHN C. EISDRIDGE,
STEPHEN R. FELSON,
*Attorneys.*

OCTOBER 1968.

# APPENDIX

## In the United States Court of Claims

No. 248–65

(Decided February 16, 1968)

---

JOHN P. KING v. THE UNITED STATES

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Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

In 1959 Colonel John P. King was retired from the Army for longevity (*i.e.*, years of service) after having accrued over thirty years for pay purposes. Under 10 U.S.C. §§ 3911, 3991 (1964), his longevity retirement pay rate has been 75 per cent of the monthly basic pay of a colonel. He contends, however, that he should have been retired for disability and that the Secretary of the Army (through the Physical Disability Appeal Board and the Board for Correction of Military Records) acted arbitrarily and capriciously in failing to retire him for disability and in refusing to correct his military record to show retirement on that ground.

Were plaintiff retired for disability, the maximum retirement pay rate to which he would then be entitled would be the same as that for longevity. See 10 U.S.C. §§ 1201, 1401 (1964). But Int. Rev. Code of 1954, § 104(a)(4), excludes from gross income "amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country * * *." Colonel King, counting on the application of this provision to the disability retirement pay he claims, filed his petition here for the difference—equal to the federal taxes assessed on his retirement pay—between disability pay and the longevity compensation he has received after taxes.

Before bringing suit, he did not, however, file a claim with the Commissioner of Internal Revenue for a refund of the taxes paid on his retirement benefits. Since Int. Rev. Code of 1954, § 7422(a), bars a suit for taxes in the absence of a timely refund claim, we issued an order[1] upholding, in

[1] "This case comes before the court on defendant's motion, filed August 19, 1966, to dismiss the petition, and on plaintiff's motion, filed November 21, 1966, to strike defendant's first affirmative defense. Upon consideration thereof, together with the opposition and responses thereto, since the court is of the view that the only possible basis upon which the case can be maintained is under the Declaratory Judgment Act, it therefore requests briefs on the applicability to this court and this case of that Act and will set the case for oral argument on those issues.

IT IS THEREFORE ORDERED that plaintiff is granted 30 days from this date to submit a brief on the applicability of the Declaratory Judgment Act to this

effect, the Government's first affirmative defense (that the "petition alleges basically a claim for a refund of taxes paid on retirement pay, without an allegation of the filing of a claim for refund") and suggesting that the sole relief which plaintiff could now possibly have from this court would be a declaration of his right to be retired for physical disability and to have his records changed accordingly. *Compare Prince v. United States*, 127 Ct. Cl. 612, 614, 623, 119 F. Supp. 421, 422 (1954) (a similar suit in which timely refund claims had been filed).

Because of the history of the point in this court (see Part I *infra*) and on account of the defendant's explicit challenge (in its motion to dismiss) to our authority to give declaratory relief, we invited reconsideration of the application of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964), to the Court of Claims and to Colonel King's case. Plaintiff and defendant have each presented briefs and oral argument. In addition, the amicus curiae, in support of plaintiff, has offered written and oral arguments of great help. We are not now concerned, it need hardly be said, with the merits of the plaintiff's retirement for longevity, rather than physical disability, or the refusal to correct his military records. The sole issue at this stage is the pertinence of the Declaratory Judgment Act, which provides:

> 2201. *Creation of remedy.*
>
> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> 2202. *Further relief.*
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable

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court and this case with defendant granted 30 days to file its response and plaintiff 15 days to reply.

IT IS FURTHER ORDERED that if plaintiff does not wish to proceed on the basis set forth herein, he has leave to dismiss the petition without prejudice."

notice and hearing, against any adverse party whose rights have been determined by such judgment.

## I

Since this is a reworking of old ground, not a first plowing, we start with the embedded authority. There are, of course, a raft of cases which can conceivably be seen as warning that a declaration may not be granted by this court or in suits against the United States.[2] The vast majority are quite distinguishable. Among them are decisions in which declaratory relief could not be granted because the suit was "with respect to federal taxes", a category expressly exempt from the Declaratory Judgment Act,[3] and those in which the prayer for relief, either explicitly or as construed by the court, was for specific relief.[4] Nor do we think that any considered implication of the absence of the remedy can be drawn from decisions limiting a money recovery in this court to the amount owing at the date of judgment;[5] holding that, for the purposes of the statute of limitations, "no cause of action accrues

[2] We deal only with declaratory relief against the United States *eo nomine*, not with declarations directed exclusively to specific public officials. "There can now be little question that a suit will lie against a * * * [public officer] for acting beyond his statutory authority, even though a subordinate. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701–02, 69 S.Ct. 1457, 93 L.Ed. 1628; and the declaratory judgment, together with an enforcing injunction, furnishes a proper device to test the scope of this authority. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 139–40, 71 S. Ct. 624, 95 L. Ed. 817." *United States Lines Co.* v. *Shaughnessy*, 195 F. 2d 385, 386 (C.A. 2, 1952).

It is clear that the district courts, under the jurisdictional grants of 28 U.S.C. §§ 1331(a), 1361 (1964) (and the pertinent District of Columbia provisions) and within the venue limitations of 28 U.S.C. § 1391(e) (1964), may issue declaratory judgments and relief in the nature of mandamus with respect to corrections in military records when the responsible official has exceeded his statutory or constitutional powers. See, *e.g.*, *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Van Bourg* v. *Nitze*, 388 F. 2d 557 (C.A.D.C., 1967); *Ashe* v. *McNamara*, 355 F. 2d 277 (C.A. 1, 1965); *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C., 1961); *Bland* v. *Connally*, 293 F. 2d 852 (C.A.D.C., 1961).

[3] See, *e.g.*, *Sweeney* v. *United States*, 152 Ct. Cl. 516, 522, 285 F. 2d 444, 447 (1961); *Wilson* v. *Wilson*, 141 F. 2d 599, 600 (C.A. 4, 1944); *Farmer* v. *Hooks*, 194 F. Supp. 1 (E.D. Ky. 1961).

[4] See *Blanc* v. *United States*, 244 F. 2d 708 (C.A. 2), *cert. denied*, 355 U.S. 874 (1957); *Kelly* v. *United States*, 138 Ct. Cl. 571, 138 F. Supp. 244 (1956); *Gaines* v. *United States*, 132 Ct. Cl. 408, 131 F. Supp. 925 (1955); *Clay* v. *United States*, 210 F. 2d 686 (C.A.D.C., 1953), *cert. denied*, 347 U.S. 927 (1954); *Hart* v. *United States*, 91 Ct. Cl. 808 (1940); *Ford Bros. & Co.* v. *Biddington Distilling Co.*, 30 F. Supp. 213 (M.D. Pa. 1939).

[5] See, *e.g.*, *Shaw* v. *United States*, 174 Ct. Cl. 899, 920, 357 F. 2d 949, 963 (1966). This is a routine practice followed for years without inquiry into the possibility of extending recovery beyond the date of judgment.

before the claimant can bring a suit for a money judgment";[6] and indicating that the Tucker Act does not supply jurisdiction to grant nominal damages.[7]

In addition, the denial of declaratory relief in this court and in other suits against the United States has often rested squarely on the ground that the court had no right to grant *any* relief (money award, specific relief, or declaratory judgment) because, in the various phrasings used in the opinions, the Government had not consented to be sued on the particular cause of action, the matter was nonjusticiable, there was no jurisdiction over the subject matter, the issue was legislatively committed to exclusive agency discretion, relief would interfere with the remedial scheme established by the

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[6] *Oceanic S.S. Co.* v. *United States*, 165 Ct. Cl. 217, 218 (1964). There the court did not reconsider the possibility of a declaratory remedy. We do not decide whether the availability of declaratory relief would require a reevaluation of the *Oceanic* holding. *Compare Luckenbach S.S. Co.* v. *United States*, 312 F. 2d 545 (C.A. 2, 1963); *American-Foreign S.S. Corp.* v. *United States*, 291 F. 2d 598 (C.A. 2), *cert. denied*, 368 U.S. 895 (1961).

[7] "[T]he futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract." *Severin* v. *United States*, 99 Ct. Cl. 435, 448 (1943) (alternative holding), *cert. denied*, 322 U.S. 733 (1944). In *Severin* the court relied on one of the "Gold Clause" cases, *Norris* v. *United States*, 294 U.S. 317, 327 (1935), where the Supreme Court stated that "the Court of Claims has no authority to entertain the action, if the claim is at best one for nominal damages." *Accord, Perry* v. *United States*, 294 U.S. 330, 355 (1935); *Marion & R.V. Ry.* v. *United States*, 270 U.S. 280, 282 (1926); *Grant* v. *United States*, 7 Wall. (74 U.S.) 331, 338 (1868) (alternative holding).

While a suit for nominal damages, like a declaratory judgment, may be instituted "to establish a right" for the purpose of terminating an ongoing dispute or of avoiding future damages (*Restatement of Torts* § 907, comment b, at 553 (1939)), it is sometimes used for pure vindication without any view to the future or redress for the judicially cognizable effects of the past (see, *e.g.*, *ibid.*; *Wilson* v. *Eberle*, 18 F.R.D. 7, 9 (D. Alaska 1955)). In the cases cited above, nominal damages were thought to serve, at best, only the latter function; there was deemed to be no real existing injury. The decisions should not, therefore, be read as antagonistic to the use of the declaratory device to adjudicate rights and liabilities without regard to the question of the recovery of damages, but rather as a particularized application of the doctrine that the federal courts cannot act in the absence of an existing "case" or "controversy". (It is hardly likely, moreover, that the Supreme Court had the Declaratory Judgment Act in mind when it decided the "Gold Clause" cases since that innovation had been adopted only a few months before.) That the "nominal damages" cases do allow separation of the issues of liability and damages is bolstered by the Court's careful distinction in *Perry* v. *United States*, *supra*, 294 U.S. at 354, between the questions of "the binding quality of the Government's obligations" and "plaintiff's right to recover damages." Our practice under Ct. Cl. R. 47 has long been to first determine liability and then to determine the recovery, if any, to which the plaintiff is entitled. See Part III *infra*.

Congress, or the claimant failed to set up any valid cause of action.[8] Similarly, in many of the cases saying broadly that a declaration cannot be given in litigation against the Government, the real concern was that granting a declaratory judgment would improperly circumvent the restrictions (judicial or legislative) on other forms of relief.[9]

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[8] *Rolls-Royce Ltd.* v. *United States*, 176 Ct. Cl. 694, 701, 364 F. 2d 415, 419–20 (1966) (intervenor's counterclaim against plaintiff—lack of jurisdiction); *Drill* v. *United States*, 157 Ct. Cl. 945 (1962) (order), *cert. denied*, 372 U.S. 912 (1963) (plaintiff had no constitutional or statutory right to a federal job); *Savorgnan* v. *United States*, 171 F. 2d 155, 159 (C.A. 7, 1948), *aff'd on other grounds*, 338 U.S. 491 (1950) (United States citizenship—no consent to suit); *Love* v. *United States*, 108 F. 2d 43, 50 (C.A. 8, 1939), *cert. denied*, 309 U.S. 673 (1940) (denial of federal employment—nonjusticiable because committed to agency discretion); *Wohl Shoe* v. *Wirtz*, 246 F. Supp. 821 (E.D. Mo. 1965) (liability under Fair Labor Standards Act—nonjusticiable because exclusive remedy lies in defense of Secretary of Labor's enforcement suit); *Bell* v. *United States*, 203 F. Supp. 871, 874 (W.D. Wis. 1962) (alternative holding) (length of criminal sentence—no consent); *Di Battista* v. *Swing*, 135 F. Supp. 938 (D. Md. 1955) (suit to have immigration bond declared not breached even though Government had not collected on the bond); *Birge* v. *United States*, 111 F. Supp. 685 (W.D. Okla. 1953) (refusal to add disability-income clause to National Service Life Insurance Act policy—not subject to judicial review); *Schilling* v. *United States*, 101 F. Supp. 525 (E.D. Mich. 1951) (refusal to issue National Service Life Insurance Act policy—not subject to judicial review); *New York Technical Institute of Md.* v. *Limburg*, 87 F. Supp. 308, 311–13 (D. Md. 1949) (alternative holding) (regulation of Trade School tuition under Servicemen's Readjustment Act—nonjusticiable because committed to agency discretion); *Commers* v. *United States*, 66 F. Supp. 943, 949–50 (D. Mont. 1946) (alternative holding), *aff'd per curiam*, 159 F. 2d 248 (C.A. 9), *cert. denied*, 331 U.S. 807 (1947) (induction into Army as a taking—no consent).

Declaratory relief against the United States has also been denied when the subject matter was within the exclusive jurisdiction of the Court of Claims. See *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912 (C.A. 2), *cert. denied*, 364 U.S. 894 (1960) (amount in contract suit exceeded $10,000); *Powers* v. *United States*, 218 F. 2d 828 (C.A. 7, 1954) (retirement benefits); *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 868, 871–72 (C.A. 9, 1953) (alternative holding) (Court of Claims remedy for claim in excess of $10,000 precludes jurisdiction based on Administrative Procedure Act); *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 150 (C.A.D.C., 1951) (amount in contract suit exceeded $10,000). Even where mandamus or specific relief might properly lie against a Government officer, see note 2 *supra*, the courts have sometimes declined, most often as a matter of discretion, to issue a declaratory judgment against the official when the plaintiff has a remedy in the Court of Claims. See *Almour* v. *Pace*, 193 F. 2d 699 (C.A.D.C., 1951); *Di Benedetto* v. *Morgenthau*, 148 F. 2d 228 (C.A.D.C.), *petition for cert. dismissed on motion of petitioner*, 326 U.S. 686 (1945); *Western* v. *McGehee*, 202 F. Supp. 287, 293–94 (D. Md. 1962) (alternative holding); *cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 132 (1940).

[9] This class is illustrated by a number of examples: (i). The Supreme Court has indicated that the judiciary should keep its hands off executive dealings in publicly-owned real property and that inverse condemnation suits for constitutional takings should be considered the primary avenue of relief. See *Malone* v. *Bowdoin*, 369 U.S. 643, 646–48 (1962); *Larson* v. *Domestic & Foreign*

This survey shows, we think, that we need not be daunted in our reconsideration by the great mass of the repeated

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*Commerce Corp.*, 337 U.S. 682, 703–05 & n. 27 (1949). In our view this attitude permeates the denials of declaratory relief in *Andersen* v. *United States*, 229 F. 2d 675 (C.A. 5, 1956) (Veteran's Administration disposal of condemned lands); *Lynn* v. *United States*, 110 F. 2d 586 (C.A. 5, 1940) (declaration of rights under deed of land made to United States); *Truesman Fertilizer Co.* v. *Larson*, 196 F. 2d 910, 911 (C.A. 5, 1952) (dictum) (General Services Administration's disposal of condemned lands).

(*ii*). Int. Rev. Code of 1954, § 7421(a), states: "Except as provided in sections 6212 (a) and (c) and 6213(a) [suits in the Tax Court], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Relying on this statement of Congressional policy, rather than the Declaratory Judgment Act's specific exception for suits "with respect to federal taxes", some courts have refused to enter a declaratory judgment against the Government where the administration of the tax laws was, directly or indirectly, at issue. See *Ballistrieri* v. *United States*, 303 F. 2d 617 (C.A. 7, 1962) (right to inspect books in possession of special revenue agent); *Zito* v. *Tesoriero*, 239 F. Supp. 354 (E.D.N.Y. 1965) (dispute over property claimed, in part, by United States under revenue laws). *But see Pettengill* v. *United States*, 205 F. Supp. 10, 12 (D. Vt. 1962) (alternative holding). See also note 14 *infra*.

(*iii*). Declaratory judgments have been refused where a writ of habeas corpus (the accepted remedy for prisoners) was unavailable, the courts saying that the petition was premature, the petitioner failed to exhaust his administrative remedies, the writ had been denied in a prior proceeding, or the petition lacked merit. See *Gibson* v. *United States*, 161 F. 2d 978 (C.A. 6, 1947); *Innes* v. *Hiatt*, 57 F. Supp. 17 (M.D. Pa. 1944); *United States* v. *Rollnick*, 33 F. Supp. 863, 866–67 (M.D. Pa. 1940).

(*iv*). Since the Interstate Commerce Act provides for relief from Commission actions, a litigant cannot "by-pass the statutory requirements and then rely on his refusal to follow the statutory procedure as creating the 'actual controversy' contemplated in the Declaratory Judgment Act." *Isner* v. *ICC*, 90 F. Supp. 361, 366 (E.D. Mich. 1950).

(*v*). Where Congress has made "the recommendation of the head of the Agency and the approval of the Civil Service Commission conditions precedent to the granting of these higher [retirement] benefits, [and] Act not laid down any rules under which the recommendations of the head of the agency shall be granted", a judicial probe of the officials' reasoning " 'would amount to a clear invasion of the legislative and executive domains.' " *Gidney* v. *United States*, 146 F. Supp. 135, 140 (S.D. Cal. 1956), quoting *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380 (1940). A similar rationale appears in *Wells* v. *United States*, 280 F. 2d 275 (C.A. 9, 1960), in which the court was asked to render a declaratory judgment relating to what it considered an unreviewable Atomic Energy Commission determination of the proper sale price for Government lands leased by the AEC to the plaintiff.

Some of the cases in this and the preceding note were brought against a public officer in addition to, or rather than, the United States. Even though the courts tended to treat the suits as "in effect" against the United States or to separate the issues of the suability of the sovereign and that of the officer, the practical unavailability (to courts other than those in the District of Columbia) of general mandamus power in suits against Government officials obviously made the judges less inclined to grant declaratory relief against either the United States or the named officials. Under 28 U.S.C. §§ 1331(a), 1361, 1391(e) (1964), the power to issue relief in the nature of mandamus is now available to all district courts. *E.g.*, *Ashe* v. *McNamara*, 355 F. 2d 277, 279 (C.A. 1, 1965). See also note 2 *supra*.

observations that the declaratory device is unavailable in actions against the sovereign. We are faced, however, with a small residue of decisions truly in point, mainly those of our own authorship. The leading adverse case, *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655 (1935), was decided the year after the Declaratory Judgment Act. Others which followed *Twin Cities*, explicitly or implictly, are *United States Rubber Co.* v. *United States*, 142 Ct. Cl. 42, 55, 160 F. Supp. 492, 500 (1958); *Prentiss* v. *United States*, 115 Ct. Cl. 78, 81 (1949) ("in effect" a suit for a declaratory judgment); and *Yeskel* v. *United States*, 31 F. Supp. 956, 957–58 (D.N.J. 1940). See also *Cobb* v. *United States*, 240 F. Supp. 574, 577–79 (W.D. Ark. 1965) (construing a prayer for declaratory relief as a prayer for money judgment).

On the other hand, *Raydist Navigation Corp.* v. *United States*, 144 F. Supp. 503 (E.D. Va. 1956), holds that a court having Tucker Act jurisdiction of actions against the Government may grant a declaratory judgment. The remedy has also been held proper in comparable Government litigation under (i) the Suits in Admiralty Act,[10] (ii) the National Service Life Insurance Act,[11] (iii) the Trading With the Enemy Act,[12] (iv) the Federal Tort Claims Act (at least as

[10] See *Luckenbach S.S. Co.* v. *United States*, 312 F. 2d 545 (C.A. 2, 1963); *American-Foreign S.S. Corp.* v. *United States*, 291 F. 2d 598, 604 (C.A. 2), *cert. denied*, 368 U.S. 895 (1961); *American President Lines* v. *United States*, 162 F. Supp. 732, 739 (D. Del. 1958), *aff'd per curiam*, 265 F. 2d 552 (C.A. 3, 1959). *Compare American Mail Line* v. *United States*, 213 F. Supp. 152, 160 (W.D. Wash. 1962). In 1961 the Rules of Practice in Admiralty and Maritime Cases were amended to provide for declaratory relief in admiralty suits. See *Luckenbach S.S. Co.* v. *United States*, 155 Ct. Cl. 81, 86 n.6, 292 F. 2d 913, 917 n.6 (1961). With the 1966 consolidation of the admiralty and civil procedure rules, F.R. Civ. P. 57, which is identical to the 1961 admiralty rule, applies to district courts sitting in their admiralty capacity.

[11] See *Unger* v. *United States*, 79 F. Supp. 281, 283–84 (E.D. Ill. 1948). *Compare Birge* v. *United States*, 111 F. Supp. 685 (W.D. Okla. 1953); *Schilling* v. *United States*, 101 F. Supp. 525 (E.D. Mich. 1951).

[12] See *Brownell* v. *Ketcham Wire & Mfg. Co.*, 211 F. 2d 121, 128 (C.A. 9, 1954). In *Schilling* v. *Rogers*, 363 U.S. 666 (1960), the Court held no more than that, since the provision at issue (Section 32(a)) did not provide for judicial review, the district court was without jurisdiction to enter a declaratory judgment. Although it did not cite the Ninth Circuit case, the Court pointed out that Section 9(a), which was the basis of *Ketcham Wire*, does allow judicial review. See 363 U.S. at 671.

a "procedural step" toward obtaining damages),[13] and (v) 28 U.S.C. § 2410 (1964), which provides for actions to quiet title to property on which the United States has or claims a mortgage or other lien.[14]

Despite *Twin Cities* and its influence, this court has indicated in recent years that the question is still open and that declaratory relief may possibly lie against the Government. In *Luckenbach S.S. Co.* v. *United States*, 155 Ct. Cl. 81, 292 F. 2d 913 (1961), the opinion not only took the position that a declaratory judgment could be entered against the United States by a district court sitting in admiralty and administering the Suits in Admiralty Act (155 Ct. Cl. at 85–87, 292 F. 2d at 916–17), but rebutted in a lengthy footnote the plaintiff's broader argument that declaratory relief can never run against the sovereign (155 Ct. Cl. at 85 n. 5, 292 F. 2d at 916 n. 5). (The note cited the cases, *supra*, holding declaratory relief available under the Federal Torts Claim Act and the Tucker Act, as it applies to the district courts.) Furthermore, in *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967), when discussing the limits of our jurisdiction, we expressly "put to one side the possible applicability of the Declaratory Judgment Act * * *." 178 Ct. Cl. at 605 n. 5, 372 F. 2d at 1007 n. 5.

While the Supreme Court has never reviewed the bearing of the Declaratory Judgment Act on Tucker Act controversies,[15] it has often mentioned, in other contexts, that the

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[13] See *Pennsylvania R.R.* v. *United States*, 111 F. Supp. 80, 85–89 (D.N.J. 1953). *But see Aktiebolaget Bofors* v. *United States*, 93 F. Supp. 134 (D.D.C. 1950) (*semble*), *aff'd on other grounds*, 194 F. 2d 145 (C.A.D.C., 1951). The Tort Claims Act gives the district courts exclusive jurisdiction of "civil actions on claims against the United States, *for money damages*." 28 U.S.C. § 1346(b) (1964) (emphasis added).

[14] See *Pettengill* v. *United States*, 205 F. Supp. 10, 12 (D. Vt. 1962) (alternative holding). *But see Zito* v. *Tesoriero*, 239 F. Supp. 354 (E.D.N.Y. 1965). In *Sonits* v. *United States*, 221 F. Supp. 762, 764 (D.N.J. 1963), the court held that resort to the Declaratory Judgment Act is unnecessary in a Section 2410 suit since an action to quiet title is, in essence, a declaratory action. See also, *e.g.*, S. Rep. 1005, 73d Cong., 2d Sess. 4–5 (1934). This is implicit in other leading cases in the area since no reference is made to the Declaratory Judgment Act. See, *e.g.*, *Falik* v. *United States*, 343 F. 2d 38 (C.A. 2, 1965).

[15] In *Dismuke* v. *United States*, 297 U.S. 167 (1936), *affirming on other grounds* 76 F. 2d 715 (C.A. 5, 1935), the Court scrutinized a decision in which the district court had entered a declaratory judgment that the plaintiff was entitled to a certain level of benefits under the Civil Service Retirement Act. See 76 F. 2d at 716. Although the Court held that the district court had

Court of Claims "has been given jurisdiction only to award money damages * * *." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962); see, *e.g.*, *United States* v. *Jones*, 336 U.S. 641, 670 (1949); *United States* v. *Sherwood*, 312 U.S. 584, 588 (1941). As discussed in Part III *infra*, we do not believe that the concept of "money judgment" jurisdiction precludes declaratory relief. We are therefore free, as we see it, of any Supreme Court mandate, and need grapple only with *Twin Cities* and the other holdings we have ourselves fathered.

## II

Looking at the problem as if for the first time, one could not help but note that the Declaratory Judgment Act, quoted in full *supra*, provides that "*any court of the United States* * * * may declare the rights and other legal relations of any interested party seeking such declaration." [Emphasis added.] [16] On its own terms, "any court of the United States" would normally call for the inclusion of the Court of Claims. See *Kamen Soap Prods. Co.* v. *United States*, 124 Ct. Cl. 519, 530 n. 5, 110 F. Supp. 430, 435, n. 5 (1953) (term as used in statute authorizing issuance of subpoenae *duces tecum*); *cf. Luckenbach S.S. Corp.* v. *United States*, *supra*, 155 Ct. Cl. at 86, 292 F. 2d at 916–17 (term as used in Declaratory Judgment Act includes admiralty court); *American-Foreign S.S. Corp* v. *United States*, *supra*

Tucker Act jurisdiction, it denied relief on the merits of the claim. In doing so, it merely noted, without discussion, that declaratory relief had been requested. See 297 U.S. at 168–69. In *Bavorgnan* v. *United States*, 338 U.S. 491 (1950), *affirming* 171 F. 2d 155 (C.A. 7, 1948), *reversing* 73 F. Supp. 109 (W.D. Wis. 1947), the Court recited that the court of appeals had reversed the district court's entry of a judgment against the Government (as well as certain officials) declaring that plaintiff was a United States citizen and had "remanded the case with directions to dismiss the petition against the United States because it had not consented to be sued * * *." 338 U.S. at 494. Although the instruction of the court of appeals was repeated in the Supreme Court's own disposition (see 338 U.S. at 506), the Court, holding against the plaintiff on the merits, did not discuss this issue. It is apparent that the basis of the court of appeals' statement was the lack of consent to any suit against the *United States*, as such, involving nationality, regardless of the remedy sought. As for the Supreme Court's "nominal damages" cases, see note 7 *supra*. For the reasons stated there, we do not think them pertinent.

[16] Prior to the 1948 codification and revision of Title 28, the phrase read: "the courts of the United States." The change in phraseology was said by the revisers to be inconsequential. See 28 U.S.C. at 6026 (1964) (reviser's notes). See Part V *infra*.

note 10, 291 F. 2d at 604 (same). Even in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Supreme Court, while declining to consider this court a constitutional court, referred to it as "a court of the United States." 279 U.S. at 455. (The constitutional—Article III—status of the Court of Claims is now firmly established. *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962); 28 U.S.C. § 171 (1964).)

Nonetheless, our court in *Twin Cities* thought the language not clear enough:

> We think the defendant's motion [to dismiss for lack of jurisdiction] should be sustained. In the case of *Pocono Pines Assembly Hotels Co.* v. *United States*, [73 Ct. Cl. 447, *motion to file petition for writ of mandamus and/or prohibition denied*, 285 U.S. 526 (1932)], we had occasion to discuss *in extenso* the jurisdiction of this court, and in view of the axiomatic legal principle that the United States may not be sued without its consent, we think it exacts a specific statute according such consent and expressly conferring jurisdiction upon this court before we may proceed. *United States* v. *Milliken Imprinting Co.*, [202 U.S. 168 (1906)]; *Eastern Transportation Co.* v. *United States*, [272 U.S. 675 (1927)]; *United States* v. *Michel*, [282 U.S. 656 (1931)].
>
> If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised. [81 Ct. Cl. at 658.]

The initial part of this rationale simply repeats the undeniable proposition that the Court of Claims' jurisdiction is dependent upon and delimited by the United States' consent to be sued and that the consent must be found in legislative enactments. See, *e.g.*, *United States* v. *Sherwood*, *supra*, 312 U.S. at 586. The cases cited stand for that premise and, for present purposes, no more.[17] In the crucial second para-

[17] *Pocono Pines* contains a lengthy discussion of the history of this court, in the course of which it is noted that the Government must consent to be sued. See 73 Ct. Cl. at 485. The spring for this discussion was an Act of Congress appearing to order the court to grant a new trial for the Government

graph of the quotation, the *Twin Cities* court expresses the view that allowance of declaratory relief would expand the Tucker Act jurisdiction of the court beyond its accepted limits; that Congress, if it meant to consent to the expansion, would have referred to the court by name in the Declaratory Judgment Act; and that, since Congress did not, the court has no warrant to assume declaratory power.

Unlike our predecessors, we believe that (a) the use of declaratory procedures is consistent with the factors historically relevant to defining and delimiting this court's jurisdiction; (b) such use need not expand the categories of claims or issues which we may consider; and (c) Congress has indicated with sufficient clarity that the court is empowered to apply the Declaratory Judgment Act. We consider the first point in Part III, the second in Part IV, and the third in Part V.

## III

When this court had barely emerged from its cocoon, the Supreme Court stated in *United States* v. *Alire*, 6 Wall. (73 U.S.) 573 (1867), that under the 1855 and 1863 Acts establishing the court (Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; Act of March 3, 1863, ch. 92, 12 Stat. 765) "the only judgments which the Court of Claims [was] authorized to render against the government * * * [were] judgments for money found due from the government to the petitioner." 6 Wall. at 575. This was reiterated two decades later in *United States* v. *Jones*, 131 U.S. 1 (1889), in which the Court held that the passage of the Tucker Act in 1887, ch. 359, 24 Stat. 505, had not enlarged the perimeter drawn in *Alire*. All subsequent decisions referring to "money judgment" or "money claim" jurisdiction under the Tucker Act are traceable to

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after a final judgment had been rendered against it. To avoid the constitutional problems of the Act, the court construed it as a Congressional reference case requesting findings of fact to aid Congress in its legislative function of appropriating monies for the satisfaction of the judgment. *Milliken* holds that Congress, through the Tucker Act, consented to suit on a claim for money on a contract as reformed even though reformation is equitable and not an incident to an action at law. 202 U.S. at 173–74. In *Eastern Transportation*, involving a maritime libel against the United States under the Suits in Admiralty Act, the Court held that there is a presumption against the suability of the Government which must be overcome by statute. See 272 U.S. at 686. The *Michel* opinion utilizes the traditional principle that statutes of limitations applicable to suits against the sovereign are strictly construed. See 282 U.S. at 660.

*Alire* and *Jones*. The court in *Twin Cities* apparently believed that this firm concept of money-judgment jurisdiction would be violated by the issuance of a declaratory judgment. We can no longer accept that position.

*1. Alire* and *Jones* dealt with prayers for specific equitable relief relating to public lands, not requests for declaratory judgment.[18] In the course of denying the relief sought in *Alire*, the Court conceded that the 1855 and 1863 Acts established a wide range of "subject-matter over which jurisdiction is conferred," [19] but went on to hold that "the limited power to render a judgment necessarily restrains the general terms" of the statutes. 6 Wall. at 575–76. Since, as construed by the Court, Section 7 of the 1863 Act was "the only one providing for the rendition of a judgment or decree in any case" in the Court of Claims and since Section 7 contemplated solely the payment by the Government of money claims, the Court concluded that Congress had confined "the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." 6 Wall. at 576. In *Jones* the Court adhered to this reasoning, holding that the Tucker Act of 1887 had not altered the statutory basis of *Alire* and adding that "we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts * * * ." 131 U.S. at 19.

*Alire* and *Jones* are thus grounded in two distinct con-

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[18] The judgment or decree entered by this court in *Alire* (and reversed by the Supreme Court) was "that the claimant recover of the government a military land warrant for one hundred and sixty acres of land, and that it be made out and delivered to * * * [the plaintiff] by the proper officer, and the decree to be remitted to the Secretary of the Interior." 6 Wall. at 576. In *Jones* the plaintiffs sought, under the Tucker Act provision granting concurrent jurisdiction to the district and then circuit courts, "equitable relief by specific performance, to compel the issue and delivery of a [timber] patent.' 131 U.S. at 14.

[19] Section 1 of the 1855 Act provided that the "court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States * * *." Section 2 of the 1863 Act listed "all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States * * *."

siderations. First, this court's jurisdiction must be defined in terms of the available remedies if Congress has provided means for effectuating only certain forms of relief; and the Tucker Act envisioned the satisfaction solely of money judgments. Second, in the absence of specific legislative authority, the Court was extremely wary of coercing, by means of specific relief, the conduct of public officials, a factor highlighted by the judicial reluctance to become involved in the administration of public lands and Government property. See also note 9 *supra*.

Neither of these reasons counsels against the availability of declaratory relief in Tucker Act suits. Since no performance by, or execution on, the defendant is sought in a prayer for declaratory relief, no further mechanism for the satisfaction of the plaintiff's claim is required when a court grants a declaration. See, *e.g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950); *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 263–64 (1933); E. Borchard, *Declaratory Judgments* 25–26 (2d ed. 1941). The Act states that the courts may "*declare* the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought.*" [Emphasis added.] The declaration is enough by itself. Conversely, no legislation, beyond the Declaratory Judgment Act, is needed to enable a court to grant full declaratory relief. The lack of provision in the Tucker Act for satisfaction or enforcement of judgments other than money judgments is therefore irrelevant.

Since *Jones* and *Alire* it has become axiomatic that this court has no direct power to grant specific equitable relief (injunctions, mandamus, restraining orders, and the like) on a claim, and cannot have unless Congress grants that power. See, *e.g.*, cases cited note 4 *supra;* S. Rep. No. 261, 83d Cong., 1st Sess. 2, 6 (1953); 99 *Cong. Rec.* 8943–44 (1953).[20] But a declaratory judgment is not a form of specific relief or, strictly speaking, an equitable remedy. Although considerations relevant to the issuance of various forms of

[20] The full effect of the second part of the Declaratory Judgment Act, § 2202 ("Further relief"), *supra*, as it pertains to this court, is obviously not now before us.

equitable relief are also pertinent to the use of the Declaratory Judgment Act (see, *e.g.*, *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948); *Wacker* v. *Bisson*, 348 F. 2d 602, 607 (C.A. 5, 1965)) and the historical origins of declaratory relief are in equity (see *Borchard* at 237–41); the procedure "is neither distinctly in law nor in equity, but sui generis" (S. Rep. No. 1005, 73d Cong., 2d Sess. 6 (1934); see *Sanders* v. *Louisville & N.R.R.*, 144 F. 2d 485, 486 (C.A. 6, 1944)). The *Twin Cities* opinion oversimplified the case when it referred to the Declaratory Judgment Act as creating "a proceeding equitable in nature" and therefore precluded by the strictures of *Alire* and *Jones* against specific equitable relief.

Nor is the nature of declaratory relief such that we should put it away because of the Court's concern in *Alire* and, especially, *Jones* about direct coercion of public officials. Any judgment of this court will inevitably have a restraining effect upon Government operations. This is true of money judgments even though we have no power to execute upon them and their satisfaction depends upon a Congressional appropriation of funds. See generally *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568–71 (1962). A judgment awarding money to a particular plaintiff can be authoritative information to officials that their conduct was unlawful and that, unless their position is altered, similar judgments may be rendered in the future. See *Friedman* v. *United States*, 159 Ct. Cl. 1, 11, 310 F. 2d 381, 387 (1962), *cert. denied*, 373 U.S. 932 (1963). A declaratory judgment has this same effect, whether or not affirmative relief (monetary or specific) is ever granted the plaintiff. See *Borchard* at 876, 896.

Nevertheless, the coercive effect of money and declaratory judgments differs markedly from that of the specific equitable sanctions. For the former, the impact stems from the volitional reaction of a responsible government in conforming its conduct to the pronouncements of an authoritative tribunal, not from fear of the personal consequences to the delinquent official or the use of force at the behest of the court. In contrast, specific equitable relief is directed at an identifiable res, a particular individual, or both, and usually commands obedience subject to the drastic compulsive powers

possessed by the judiciary.[21] See *United States* v. *Boutwell*, 17 Wall. (84 U.S.) 604, 607 (1873); *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, 472–73 (1951) (Frankfurter J., concurring); *Land* v. *Dollar*, 190 F. 2d 366, 623 (C.A.D.C.), *cert. granted*, 341 U.S. 737 (1951) (per curiam opinion), *cert. dismissed on motion of petitioner*, 344 U.S. 806 (1952). *Compare Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475, 500–01 (1866).

The Senate Judiciary Committee recognized this difference when it supported the passage of the federal Act with the observation that "[m]uch of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments." S. Rep. No. 1005, 73d Cong., 2d Sess. 3 (1934); *cf. Zwickler* v. *Koota*, 389 U.S. 241 (1967). In our judgment, the clear distinction between declaratory and specific relief supports the conclusion that the *Alire-Jones* rationale should not be extended past the latter to encompass a procedure that differs little, in the nature of its restraining force, from the money judgments traditionally entered by the Court of Claims.

*2.* There are, of course, other important similarities between our present practice and declaratory relief. Because no execution can be had on our money judgments, the declaratory technique has often been compared to Tucker Act procedure. The Supreme Court relied on this analogy in upholding the constitutionality of a state's declaratory judgment act. See *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 263 (1933). As the Senate Judiciary Committee stated, "The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution." S. Rep. No. 1005, 73d Cong., 2d Sess. 5 (1934).

Moreover, pursuant to Court of Claims Rule 47(c) "a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the amount of recovery, *if any*, for further proceedings" and "the judgment on the question of the right to recover shall be final." [Emphasis

[21] In an enlightened government, direct coercion is rarely necessary "for very few officials are likely to violate their duties and exceed their powers, when these are conclusively delimited and declared by the decision of a court." *Borchard* at 876.

added.] In a great number of cases utilizing Rule 47(c) we have, in effect, declared the liability of the defendant before it was determined whether there would be any money award at all.[23] *E.g.*, *Shaw* v. *United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966). Like a formal declaratory judgment, a decree of liability entered under the rule is a mere statement of rights, though it too may be (but not surely) the basis for the recovery, in the future, of money.[23] In some instances, we have declared the claimant entitled, although in the very same opinion we have concluded that he could not recover any money; a recent example is *Everett* v. *United States*, 169 Ct. Cl. 11, 340 F. 2d 352 (1965), where a federal employee who was held illegally discharged was at the same time barred from a money judgment because he could not prove that he was able to work during the period of his wrongful removal. In practical effect *Everett* and like decisions are fully equivalent to the declaratory judgment which the present plaintiff would seek.

Again, money judgments and declaratory judgments are both res judicata in later suits between the parties. Declarations have, by statute, "the force and effect of a final judgment or decree" and, therefore, collaterally estop the litigants from retrying issues. See, *e.g.*, *Green* v. *United States*, 145 Ct. Cl. 628, 172 F. Supp. 679 (1959). The doctrine of collateral estoppel also applies to a money judgment, even though the recovery is usually limited to the amount accrued by the judgment date. See *Moser* v. *United States*, 42 Ct. Cl. 86 (1907); 49 Ct. Cl. 285 (1914), *appeal dismissed on motion of appellant*, 239 U.S. 658 (1915); 53 Ct. Cl. 639 (1918); 58 Ct. Cl. 164 (1923), *aff'd*, 266 U.S. 236 (1924).[24]

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[22] It is not unknown for a plaintiff with a holding of liability to find himself unable to obtain a money judgment. In contract matters he may be unable to prove damages; in personnel removal cases (civilian or military) he may have had more outside earnings than his government pay or he may be unable to prove that he was ready, willing, and able to work during his unlawful separation.

[23] The second section of the Declaratory Judgment Act, § 2202, provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights *have been determined* by such judgment." [Emphasis added.] The parallel to Rule 47(c) is obvious.

[24] This is a famous series of cases in which the claimant sued, successively and successfully, for his pay when the military refused for a great number of

The sum of it is that this manifold kinship between our money awards and declaratory judgments presses us to disagree strongly with the conclusion in *Twin Cities* that the Declaratory Judgment Act "concerns a proceeding * * * foreign to any jurisdiction this court has heretofore exercised." On the contrary, the "foreign" proceeding is a very close and domestic relative indeed.

*3.* Furthermore, to countenance declaratory proceedings in this court would not subject the Government to strange and alien practices. The United States has instituted many declaratory actions. See, *e.g.*, *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967); *Wyoming* v. *United States*, 310 F. 2d 566 (C.A. 10, 1962), *cert. denied*, 372 U.S. 953 (1963); *Mashunkashey* v. *United States*, 131 F. 2d 288, 290–91 (C.A. 10, 1942), *cert. denied*, 318 U.S. 764 (1943). More important, actions for declaratory relief against Government officers are often brought in the district courts (see note 2 *supra*), and the issues in many of those cases clearly could and do form the basis for Tucker Act suits against the United States in this court. Examples are suits relating to removal of an employee, discharge or separation of a soldier, retirement pay of officers, or court-martial orders dismissing a serviceman.

For the past decade we have consistently held that district court declaratory judgments against public officers will usually collaterally estop both the plaintiff and the United States from relitigating the issues here. See *Technograph Printed Circuits, Ltd.* v. *United States*, 178 Ct. Cl. 543, 550–51, 372 F. 2d 969, 974–75 (1967); *Green* v. *United States*, 145 Ct. Cl. 628, 172 F. Supp. 679 (1959); *Edgar* v. *United States*, 145 Ct. Cl. 9, 171 F. Supp. 243 (1959); *Larsen* v. *United States*, 145 Ct. Cl. 178, 170 F. Supp. 806 (1959); *Williams* v. *United States*, 134 Ct. Cl. 763, 139 F. Supp. 951 (1956).[25]

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years to acquiesce in this court's original ruling. The Comptroller General has adhered to the *Moser* principle, thus making it unnecessary for litigants to continually prosecute claims already adjudicated by the court. See 44 Comp. Gen. 821, 822–23 (1965) (No. B–141826); 36 Comp. Gen. 501 (1957) (No. B–6882); 36 Comp. Gen. 489, 491–92 (1957) (No. B–114422).

[25] Two earlier cases to the contrary (*O'Brien* v. *United States*, 124 Ct. Cl. 655 (1953), and *Levy* v. *United States*, 118 Ct. Cl. 106 (1950), *overruled in subsequent order*, 169 Ct. Cl. 1020, 1023, *cert. denied*, 382 U.S. 862 (1965)) were disapproved in *Edgar* v. *United States*, *supra*, 145 Ct. Cl. at 16, 171 F. Supp. at 248.

*But see Marshall* v. *Crotty*, 185 F. 2d 622, 628 (C.A. 1, 1950). *Compare O'Brien* v. *United States*, 148 Ct. Cl. 1 (1960) (laches). Thus, in actual practice, the Government has long been subject to binding declaratory judgments involving certain Tucker Act causes of action.

## IV

It is implicit in what we have said that use of the Declaratory Judgment Act need not, and will not, be used to expand the classes of claims or issues which this court may consider. The Act itself states that a court may adopt the procedure only in cases "within its jurisdiction." The Supreme Court has unequivocally held that, with the enactment of the federal statute, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction". The Court said that "jurisdiction", in this context, "means the kinds of issues which give right of entrance to federal courts." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).[26]

For this court "the kind of issue which gives right of entrance" is declared, for the most part, by our general jurisdictional statute, now 28 U.S.C. § 1491 (1964).[27] There must be a "claim" and it must be "against the United States". The cause of action has to be founded upon the Constitution, a statute, a regulation, or a contract, or be non-tortious in character. Historically, also, the area with which we have dealt has been that of controversies with a money cast—cases tied in some way to a demand or call upon the Government for the payment of money to the claimant, either because his money (or property) was wrongfully taken by (or

[26] The opinion added: "Prior to that [the Declaratory Judgment] Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediate enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified." 339 U.S. at 671–72.

[27] "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

handed over to) the United States or because the United States owes or will owe him money on account of some contract or provision of law. See *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 605–07, 372 F. 2d 1002, 1007–09 (1967); *cf. Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 125, 340 F. 2d 663, 667, *cert. denied*, 381 U.S. 950 (1965); *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 167 Ct. Cl. 236, 244–45, 334 F. 2d 622, 626–27 (1964), *cert. denied*, 379 U.S. 964 (1965). But for a suit to have such a money cast does not require (as we have pointed out) that the plaintiff immediately seek a money judgment from this court or even that he ever seek such a judgment. What it does mean is that the claimant, if he does not ask for a money judgment, pray for this court's help in order to be in a position to collect money from the United States, sometime in the future. Such an action has a money cast and is money-oriented—can, in other words, properly be called a "money claim" or at least a "money-related claim" against the Federal Government—in the realistic sense that the plaintiff's declaratory judgment, if he prevails, will lead to his being able to receive money from the Government, if he chooses, perhaps immediately after the judgment or perhaps at some future time. The claim for money may not be current or immediate but it is at least potential, and the action is therefore linked to the recovery of money from the Government.

The present plaintiff's case will illustrate. If he receives a declaratory judgment, Colonel King will not have a money judgment from us. But his claim will nevertheless have a monetary cast. He can use his declaration, perhaps, to obtain administratively from the Army an amount equivalent to the taxes he has paid since 1959 on his retirement pay, but which he cannot recover judicially in this suit because he failed to file proper refund claims with the Internal Revenue Service. At the least his declaration will lead the Army, presumably, to change its records for the future as to the nature of his retirement and thereafter to pay him future retirement pay on the basis of disability retirement, *i.e.*, without any deduction for taxes. If the Army remains obdurate, he can use his declaration as the predicate for a further suit

in this court asking a money judgment for the amounts withheld after the declaration. In short, we can properly anticipate that, if plaintiff prevails on the merits and secures a declaratory judgment, he will in the future be able to receive money from the United States to which he is entitled. On this view he plainly has a monetary claim or demand against the Government, actual and potential—a money-related claim, if you will—even though he cannot now have a money *judgment* from the court.

Another example comes from *Raydist Navigation Corp.* v. *United States*, *supra*, 144 F. Supp. 503, the district court decision holding declaratory relief open in a Tucker Act suit. That plaintiff's 1951 contract with the Government had been completed and the final payment made when the contracting officer requested a voluntary refund. This was not forthcoming, and the defendant deducted a sum from one of the partial payment invoices submitted by the plaintiff in connection with another, entirely unrelated, contract awarded in 1955. The court denied a motion to dismiss the plaintiff's action for a declaratory judgment, reasoning:

> Such an action is peculiarly applicable to this case as plaintiff alleges that it is engaged in contracts with other agencies of the Government, that it intends to continue to bid on such contracts, and that reopening of closed contracts permitting alleged arbitrary and unlawful deductions would seriously jeopardize the security of all contracts made with the United States or any agency thereof. [144 F. Supp. at 505–06.]

The contractor, it is clear, had a monetary claim although it did not, and could not at that time, seek a money judgment; if the court upheld its position, the defendant would no doubt discontinue deductions from payments on the unrelated contracts and credit the plaintiff with the sums already deducted. In that way the plaintiff could, and probably would, use the declaration to obtain money from the United States to which plaintiff had a legal right. Other examples, briefly, come from the civilian employee whose declaration that he was illegally discharged by the Government can aid him in obtaining reinstatement to the old post or a new federal job, and therefore a place once again on the payroll; or the serv-

iceman whose declaration that his discharge was wrongful can likewise lead to his reinstatement or new enlistment.

All we hold today is that claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast, money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. That use of the Declaratory Judgment Act will surely not extend our jurisdiction or contravene 28 U.S.C. § 1491, *supra*. Whether there are other classes (*i.e.*, non-money-related cases) in which a declaratory proceeding can validly be offered by this court we leave open for further development. At the least, plaintiff's category falls this side of the jurisdictional boundary.

Of course, a declaratory proceeding could not be used for money-related claims which this court cannot consider. It would have made no difference, for instance, if the plaintiff in *Eastport S.S. Corp.* v. *United States*, *supra*, 178 Ct. Cl. 599, 372 F. 2d 1002, had framed a demand for a declaratory judgment, or both such a decree and a money award, instead of solely for damages. Claimants with tort claims against the Government, or other causes of actions over which we have no power, cannot evade the subject-matter limitations on our jurisdiction by refashioning their actions in the terms of a declaratory proceeding. So also, specific relief otherwise unavailable here (injunction, mandamus, specific performance, prohibition, orders *in rem*) cannot be obtained in violation of the *Alire-Jones* doctrine.[28] Nor can a claim which is not in reality against the Government be camouflaged as such in the guise of a declaratory proceeding. For a money-related claim against the United States, all that can happen under the Declaratory Judgment Act as applied in this court is that the plaintiff's right, if it is within our competence, will be recognized "even though no immediate en-

[28] As already indicated (note 20 *supra*), we do not now reach or consider any right this court may have to give specific relief under 28 U.S.C. § 2202 as ancillary to a declaration previously given.

forcement of it [is] asked." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, *supra*, 339 U.S. at 671.

We are quite aware that the application of the remedy may raise novel, and perhaps difficult, issues relating to the statutes of limitations (see, *e.g.*, note 6 *supra*); to exhaustion of administrative determinations (*cf.*, *e.g.*, *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 545 n. 5 (1946), *reversing sub nom. Waterman S.S. Corp.* v. *Land*, 151 F. 2d 292 (C.A.D.C., 1945); *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C., 1961)); to piecemeal litigation of causes of action, especially in contract cases (see *Nager Elec. Co.* v. *United States*, 177 Ct. Cl. 234, 245–46, 368 F. 2d 847, 855–56 (1966), and cases cited); and, more generally, to the determination, when the petition is for declaratory relief, whether the matter is a justiciable controversy within our jurisdiction.

But these problems are by no means insuperable, and we will face them as they arise without attempting now to lay down standards for the application of the Act that will cover all cases at all times. Our endeavor to accommodate the declaratory proceeding to our practice will be aided not only by the large body of decisional law in other courts but by the discretion which Congress has distinctly allowed the federal courts in employing this remedy. As the Supreme Court emphasized, after capsuling the conventional black-letter rules governing declaratory relief:

> "[W]hen all of the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. [*Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 243 (1952).]

Scores of decisions prove that this power to refuse declaratory relief as a matter of discretion is not empty. We too can exercise that authority.

V

Because the term "any court of the United States" in the operative clause of the Declaratory Judgment Act strongly suggests the inclusion of the Court of Claims and because we believe that declaratory relief is consistent with the concept of money-judgment jurisdiction established by *Alire* and *Jones*, that it need not be used to expand our jurisdiction, and that it would not result in the exposure of the sovereign to an alien remedy, we do not require, as the court in *Twin Cities* did, a totally unambiguous Congressional statement vesting us with the authority to grant declaratory relief against the United States. See *Raydist Navigation Corp.* v. *United States*, *supra*, 144 F. Supp. at 505; *cf. Unger* v. *United States*, *supra* note 11, 79 F. Supp. at 283–84. We think it suffices if Congress failed to give any meaningful indication that this reform—introduced many years after the Tucker Act and in language covering our court and our cases—should not be applicable. *Cf. American-Foreign S.S. Corp.* v. *United States*, *supra* note 10, 291 F. 2d at 604. As we shall now point out, the legislative record is free of any such purpose.

*1.* The first proposal for a federal declaratory judgment statute was introduced in 1919. From then until the Act was passed in 1934, the House Judiciary Committee held short hearings on two occasions [29] and issued brief favorable reports seven times; [30] the House debated the issue in six different years, [31] passing a declaratory judgment bill four times. [32] Although Senate hearings were held in 1927, [33] the Senate

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[29] *Hearing on Legislation Recommended by the American Bar Ass'n Before House Comm. on the Judiciary*, 67th Cong., 2d Sess., ser. 25 at 5–16 (1922); *Hearing on Declaratory Judgments Before House Comm. on the Judiciary*, 69th Cong., 1st Sess., ser. 12 (1926).

[30] H.R. Rep. No. 1441, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 928, 69th Cong., 1st Sess. (1926); H.R. Rep. No 288, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 366, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 94, 71st Cong., 1st Sess. (1929); H.R. Rep. No. 627, 72d Cong., 1st Sess. (1932); H.R. Rep. No. 1264, 73d Cong., 2d Sess. (1934).

[31] 66 *Cong. Rec.* 408–11, 4874 (1925); 67 *Cong. Rec.* 9546 (1926); 69 *Cong. Rec.* 1680–88, 2025–32 (1928); 75 *Cong. Rec.* 14091 (1932); 76 *Cong. Rec.* 697–98 (1932); 78 *Cong. Rec.* 8224 (1934).

[32] 67 *Cong. Rec.* 9546 (1926); 69 *Cong. Rec.* 2032 (1928); 76 *Cong. Rec.* 697–98 (1932); 78 *Cong. Rec.* 8224 (1934).

[33] *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Committee on the Judiciary*, 70th Cong., 1st Sess. (1929).

Judiciary committee did not report until 1934.[34] In that year, the Senate first passed its own version of the legislation and then adopted the House-passed bill.[35]

The focus of the discussions in the hearings, reports, and debates was on the constitutionality of the bill, its res judicata implications, and whether declaratory relief should be allowed unless all interested parties consented to the procedure. Nowhere is there any specific consideration of the applicability of the remedy to the Court of Claims or to Tucker Act litigation. Though a number of statements made in other contexts could be interpreted as bearing on the issue, all are, at best, ambiguous.

First, in the reports and during floor debate, the legislators referred to the procedure as applicable in the "Federal courts", a term intimating inclusion of every court in the federal judicial system. See, *e.g.*, S. Rep. No. 1005, 73d Cong., 2d Sess. 1 (1934); 69 *Cong. Rec.* 1681, 1685, 1686 (1928) (remarks of Representatives Celler, Dyer, and Newton); 78 *Cong. Rec.* 10565 (1934) (remarks of Senator Robinson). Second, the expected benefits of the Act were illustrated by the citation of cases from the British and New York experience with similar procedures, and those cases included claims against a government. See *Hearing on Legislation Recommended by the American Bar Ass'n Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess., ser. 25, at 10 (1922) (testimony of A.B.A. witness H.W. Taft); 69 *Cong. Rec.* 1687, 2029 (1928) (remarks of Representatives Celler and La Guardia). See also *Borchard* at 854. Third, the Senate report, as already indicated, drew an analogy between Court of Claims money judgments and declaratory judgments when it said, "The decisions of the United States Court of Claims are essentially declaratory in nature * * *." S. Rep. No. 1005, 73d Cong. 2d Sess. 5 (1934). Fourth, the Committee's reference to the "United States Court of Claims" could be construed as an implicit recognition that the court was to be included in the term "the courts of the United States" as used in the 1934 Act.

[34] S. Rep. No. 1005, 73d Cong., 2d Sess. (1934).
[35] See 78 *Cong. Rec.* 10564–65, 10919 (1934).

On the other side, during a 1925 colloquy on the House floor, Congressman Montague (then chairman of the Judiciary Committee) stated that the "act applies to Federal district courts and the courts of the District of Columbia." 66 *Cong. Rec.* 4874 (1925). Further, according to *Williams v. United States*, 289 U.S. 553 (1933), the Court of Claims was not a constitutional (Article III, Section 2) court;[36] the Congressional concern with the constitutionality of the Act was phrased entirely in terms of the consistency of the procedure with the exercise of Article III judicial power; since no reference was made to the difference in constitutional problems with respect to legislative courts, a tenuous argument could be drawn that the Congress did not intend to include such courts. For a discussion of constitutionality, see, *e.g.*, *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. 61–81 (1929) (testimony of Representative Denison and memorandum of Professor Borchard).

Individually and collectively these scattered excerpts and thin inferences fail to provide a sound foundation for concluding that Congress either did or did not intend to authorize the granting of declaratory relief by the Court of Claims. The truth seems to be that the issue simply was not within the express legislative contemplation.[37]

Scant attention has been paid by the secondary legal authorities to this precise question of Congressional intent. Most merely report and accept as law *Twin Cities* and its offspring. See, *e.g.*, 6A *J. Moore's Federal Practice*, ¶ 57.02 [4], at 3011 & nn. 8–9 (2d ed. 1966); *Developments in the Law—Declaratory Judgments*, 62 Harv. L. Rev. 787, 824 n.284 (1949). However, Professor Edwin Borchard, who was

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[36] But, as mentioned above, the asserted legislative status of the Court of Claims did not prevent the Supreme Court from terming it "a court of the United States". *Ex parte Bakelite Corp.*, *supra*, 279 U.S. at 455.

[37] The 1935 amendment (Revenue Act of 1935, ch. 829, § 405, 49 Stat. 1014, 1027) excluding disputes "with respect to taxes" provides even less guidance in determining the scope of the Act in non-tax matters. See S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 1885, 74th Cong., 1st Sess. 13 (1935); 79 *Cong. Rec.* 13227–28 (1935); 13 *Tax Magazine* 539 (1935) (reprinting the Justice Department's memorandum suggesting the change); *Borchard* at 850–57.

the chief extra-Congressional sponsor of the federal Act,[38] said in his treatise that the statute does not permit declarations "outside the terms of the Tucker Act" but does authorize such judgments "within the permitted limits" of the Tucker Act. *Borchard* at 873. We understand this to mean that he disputed any assertion that declaratory relief may never be granted in Tucker Act suits. He seemed to interpret *Twin Cities* and other such decisions as holding only that declaratory judgments are unavailable in cases otherwise nonjusticiable or outside the general jurisdiction of this court.

*2.* The 1948 revision and codification of the Judicial Code added a new Section 451 expressly including the Court of Claims in the term "court of the United States" as used in Title 28. Act of June 25, 1948, ch. 646, § 451, 62 Stat. 869, 907 (now 28 U.S.C. § 451 (1964)). Since the Declaratory Judgment Act, as revised, allows "any court of the United States" to grant declaratory relief, the 1948 Code undeniably indicates, if its phrasing is taken at face value, that the Court of Claims possesses the power to issue a declaratory jugment.

The hearings, reports, and floor debates preceding the 1948 enactment show no recognition that Section 451 has that result, whether the effect be repetition of, or clarification of, or change in the 1934 Act.[39] Nor is there evidence of an intent to ratify or overturn the prior judicial construction of the term "court of the United States" as used in the Declaratory Judgment Act.[40] *Compare Western Pac. R.R.* v. *Western Pac. R.R.*, 345 U.S. 247, 253–57 (1953).

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[38] See, *e.g.*, H.R. Rep. 1264, 73d Cong., 2d Sess. 2 (1934); 69 *Cong. Rec.* 1687 (1928) (remarks of Representative Celler); *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Comm. on the Judiciary*, 70th Cong. 1st Sess. 15–22, 70–81 (1929) (testimony and statement of Professor Borchard).

[39] *See Hearings on H.R. 3214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. (1948); *Hearings on Revisions of Titles 18 and 28 of the United States Code Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. (1947); S. Rep. No. 1559, 80th Cong., 2d Sess. (1948); H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947). The House and Senate debates are reprinted in *U.S. Code Cong. Serv., New Title 28—United States Code* 1986–2040 (1948).

[40] In 1954 Congress made the Act applicable to the district court for Alaska (then a territory) after *Reese* v. *Fults*, 96 F. Supp. 449 (D. Alaska 1951), had held it inapplicable. Act of Aug. 28, 1954, ch. 1033, 68 Stat. 890. To our knowledge, the Congress has never had its attention called to the *Twin Cities* line of cases.

The reviser's notes, which are an authoritative aid for statutory construction (*Western Pac. R.R.* v. *Western Pac. R.R.*, *supra*, 345 U.S. at 254–55), do not refer to the Court of Claims or to the Tucker Act in the comments on Sections 2201–02 (the Declaratory Judgment Act), and they state only that Section 451 was "inserted to make possible a greater simplification in consolidation of the provisions of this title" 28 U.S.C. at 5913, 6026–27 (1964). This notation, though persuasive, does not, in itself, demonstrate that a clarification or change was not made in existing law. It is true that, in the preparatory stages of the 1948 codification, "great care [was] taken to make no changes in existing law which would not meet with unanimous approval." S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948). However, for the reasons stated in Parts III and IV of this opinion, we do not think that a change, if any, made by Section 451 would be considered controversial. *Compare, e.g., Fourco Glass* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227–28 (1957); *Western Pac. R.R.* v. *Western Pac R.R.*, *supra*, 345 U.S. at 256–57; *United States* v. *National City Lines*, 337 U.S. 78, 80–84 (1949); *Ex parte Collett*, 337 U.S. 55, 61–71 (1949). By far the most likely reason for the lack of further comment on Section 451 is that the drafters assumed that it merely restated the obvious and accepted meaning, in all contexts, of the phrase "court of the United States".

*3.* We are left with the clear statement in the 1948 revision that the Court of Claims is automatically included in the enabling clause of the Declaratory Judgment Act, set against a backdrop of comparable phraseology in the 1934 Act that seems literally to include the court but had been construed in favor of exclusion (without Congressional awareness of that interpretation). Because of our disagreement with the premises of *Twin Cities* (see Parts III and IV, *supra*), we read the original 1934 Act as adequately authorizing the court to render declaratory judgments. But we note, in connection with the 1948 revision, that in circumstances even less compelling the Supreme Court has held that "[t]he revised form * * * is to be accepted as correct, notwithstanding a possible discrepancy" with the pre-existing legislation. *Continental Cas. Co.* v. *United States*, 314 U.S. 527,

530 (1942); see *United States* v. *Bowen*, 100 U.S. 508, 513 (1879). On both bases, we shall no longer follow *Twin Cities*.

## VI

Having concluded that the court is empowered to issue declaratory judgments, we turn to the second question now before us: the applicability of this procedure to Colonel King's claim that, by the capricious action of the Secretary of the Army, he was retired for longevity rather than physical disability and that his records should have been corrected to indicate retirement for the latter.

The Government does not (and could not) intimate at this stage that this is an improper case for declaratory relief under the general rules summarized in *Public Serv. Comm'n* v. *Wycoff Co.*, *supra*, 344 U.S. at 242–43, and *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937). Suits for the declaration of a plaintiff's right to have his military records corrected are a relatively common-place occurrence in the federal district courts. See, *e.g.*, *Van Bourg* v. *Nitze*, 388 F. 2d 557 (C.A.D.C., 1967), and other cases cited note 2 *supra*.

Nor is there any doubt that the subject matter of the petition is within our jurisdiction. Over the years we have decided innumerable disputes over disability retirement ratings and the actions of military review and record-correction boards.[41] As shown in Part IV *supra* the present case fits snugly into the traditional class of money claims against the Federal Government. So far as now appears, we hold, this is a proper case in which to consider the award of a declaration. Naturally, we do not preclude the court, if the circumstances as they are developed direct that course, from ultimately declining a declaration as a matter of discretion.

The defendant does contend that this is a suit "with respect to federal taxes" and thus excluded from the Declaratory Judgment Act. Quite obviously the plaintiff is interested in the tax consequences of his retirement rating. But that does

[41] See, *e.g.*, *Hutter* v. *United States*, 170 Ct. Cl. 517, 345 F. 2d 828 (1965); *Merriott* v. *United States*, 163 Ct. Cl. 261 (1963), *cert. denied*, 379 U.S. 838 (1964); *Egan* v. *United States*, 141 Ct. Cl. 1, 158 F. Supp. 377 (1958); *Friedman* v. *United States*, 141 Ct. Cl. 239, 158 F. Supp 364 (1958); *Capps* v. *United States*, 133 Ct. Cl. 811, 137 F. Supp. 721 (1956); *Lemly* v. *United States*, 109 Ct. Cl. 760, 75 F. Supp. 248 (1948), and cases cited.

not make it an action "with respect to federal taxes." The determination which plaintiff requests is not a determination of his tax liability; the interpretation and application of Int. Rev. Code of 1954, § 104(a) (4) (allowing exclusion of allowances for armed-services connected injuries and sicknesses) is totally irrelevant to the questions he seeks to place before us.[42] See *Prince* v. *United States*, *supra*, 127 Ct. Cl. at 617, 119 F. Supp. at 423–24. The only questions he presents, or need present, relate to his retirement from the Army, and those are the only issues with which this court will treat in its further proceedings in this case. In the circumstances, Colonel King's tax motives have absolutely no bearing on the application of the declaratory remedy. See *Stern & Co.* v. *State Loan & Fin. Co.*, 205 F. Supp. 702, 706 (D. Del. 1962). *Compare Wilson* v. *Wilson*, 141 F. 2d 599 (C.A. 4, 1944).[43]

Defendant's motion to dismiss the petition is denied. Plaintiff is granted permission to amend his petition, within 30 days of the date hereof, to seek explicitly a declaration of his right to be retired for disability and to have his military records changed. The case is then to be returned to the trial commissioner for further proceedings on the prayer for declaratory relief.

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[42] There is no question that § 104(a)(4) of the Internal Revenue Code would exempt his retirement pay from income tax if he were held retired for disability. *Freeman* v. *United States*, 265 F. 2d 66 (C.A. 9, 1959); *McNair* v. *Commissioner*, 250 F. 2d 147 (C.A. 4, 1957); *Prince* v. *United States*, *supra*, 127 Ct. Cl. 612, 617, 119 F. Supp. 421, 423–24; Treas. Reg. § 1.104–1(c).

[43] In *Stern & Co.* the plaintiff sought a judgment declaring that the defendant had breached its contract to purchase plaintiff's stock by allocating an excessive portion of the purchase price to plaintiff's covenants not to compete. The Commissioner of Internal Revenue, on the basis of defendant's allocation, had reopened plaintiff's income tax returns and asserted that that portion of the sales price constituted ordinary income. Although the court stayed the suit pending proceedings in the Tax Court, it held the tax motives irrelevant because the breach could be determined by reference solely to the contract and because a determination of the propriety of the allocation with respect to the contract would not bind the Commissioner in determining the issue with respect to the tax laws. Subsequently the plaintiff received an order of nonliability from the Tax Court and returned to the district court, where he succeeded in obtaining damages for breach of contract. See *Stern & Co.* v. *State Loan & Fin. Corp.*, 238 F. Supp. 901 (D. Del. 1965).

In contrast to the *Stern* case, *Wilson* involved a suit against four persons (including plaintiff's wife and daughter) allegedly owning interests with him in a business partnership and against the Commissioner of Internal Revenue for a declaration of the interest the supposed partners owned and of the right to have taxes assessed according to the court's determination of the ownership interests. The four private parties did not dispute plaintiff's allegations as to their interests, thus leading the court to the conclusion that the only controversy in the suit was between the plaintiff and the Commissioner over plaintiff's tax liability, clearly a controversy "with respect to federal taxes."

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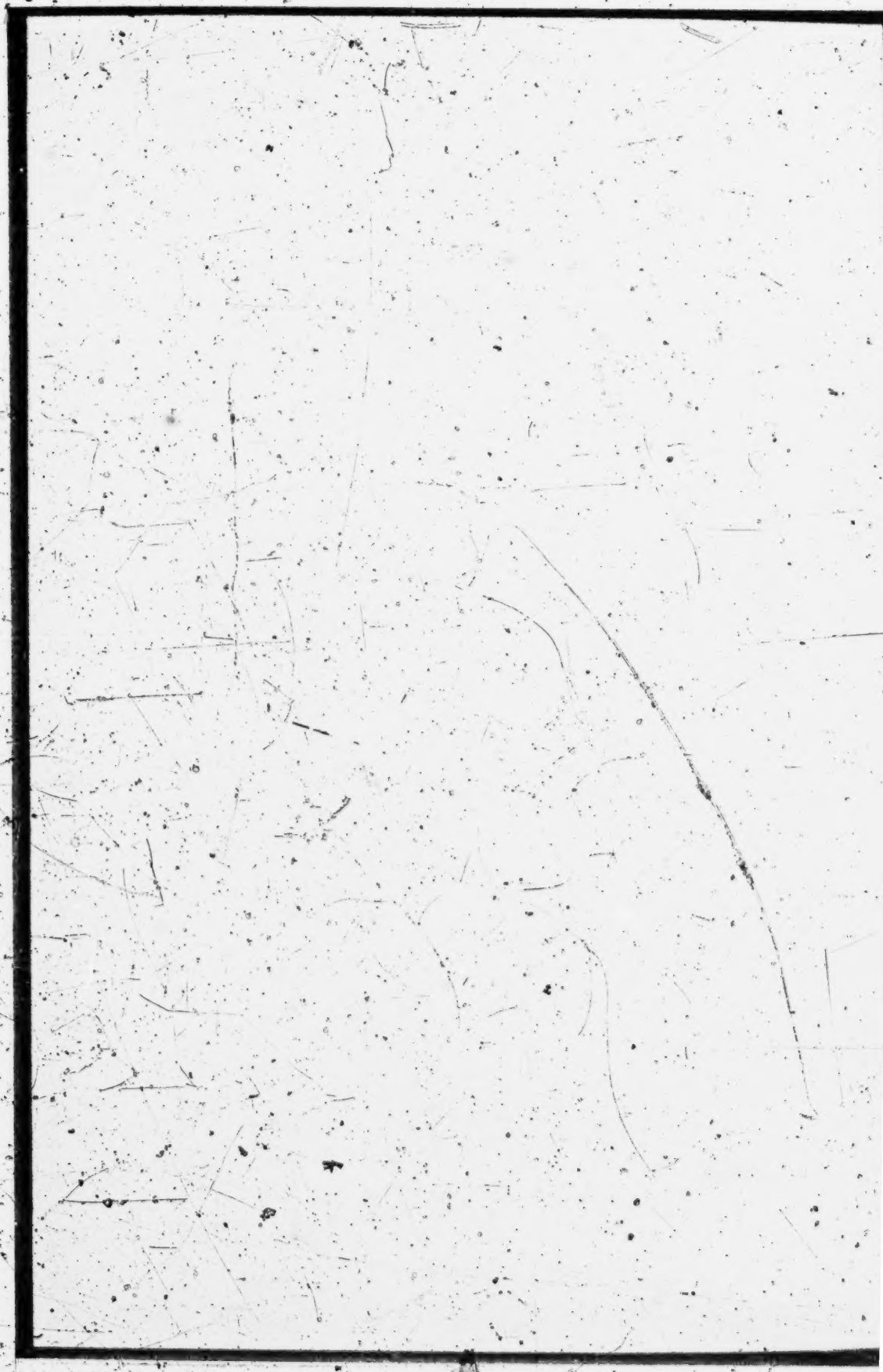

No. 672

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

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UNITED STATES OF AMERICA,
*Petitioner*,

v.

JOHN P. KING

---

**On Petition for a Writ of Certiorari to the United States Court of Claims**

---

## BRIEF FOR RESPONDENT IN OPPOSITION

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## CITATIONS

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## BRIEF FOR RESPONDENT IN OPPOSITION

---

### OPINION BELOW

The opinion and order of the United States Court of Claims (Petition, Appendix, 1A-30A) are reported in 182 Ct.Cl. 631, 390 F.2d 894.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

### QUESTION PRESENTED

The question presented in the petition (Pet. 2) is: Whether the Declaratory Judgment Act (28 U.S.C. § 2201,

*et seq*) grants the Court of Claims jurisdiction to enter declaratory judgments against the United States.

It is respondent's position this is not the question at issue. It is not a question of the Declaratory Judgment Act granting "jurisdiction" to the Court of Claims. The matter which the decision of the Court of Claims resolved was that the Declaratory Judgment Act is applicable to the Court of Claims and, specifically, to respondent's case. Hence, the question before the Court is:

> Whether the Declaratory Judgment Act (28 U.S.C. § 2201, *et seq*) applies to the United States Court of Claims.

## STATUTES INVOLVED

The petition (Pet. 2) does not recite all statutes pertinent to this Court's consideration of the question as to whether the Declaratory Judgment Act applies to the United States Court of Claims.

The petitioner merely recites (Pet. 2) 28 U.S.C. § 1491 (Claims against the United States) (i.e. The Tucker Act)[1] and 28 U.S.C. § 2201 (i.e. The Declaratory Judgment Act).[2] It did not recite the pertinent provisions of

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[1] 28 U.S.C. § 1491, The Tucker Act, provides:

> § 1491. Claims against United States generally * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[2] 28 U.S.C. § 2201, The Declaratory Judgment Act, provides:

> § 2201. Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 451 (Definitions) (Act of June 25, 1948, Ch. 646, 62 Stat. 869, 907).

28 U.S.C. § 451 (Definitions) provides, in pertinent part:

> § 451. Definitions
>
> As used in this title:
>
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

## STATEMENT

The petition does not recite the full facts pertinent to the question of the applicability of the Declaratory Judgment Act to the United States Court of Claims and, in part, errs in recital of the facts.

The undisputed facts relating to this proceeding, as shown by the petition and answer filed in the United States Court of Claims (certified and filed with this Court) are as follows:

(1) On May 14, 1959 an Army Physical Evaluation Board (PEB) found respondent unfit for active duty by reason of physical disability.[3] The PEB recommended his placement on the Temporary Disability Retired List[4] and reevaluation as provided by law (Ct.Cl. Pet., Para. 4, P. 2). On June 18, 1959 the Army Physical Review Council (APRC) reviewed the PEB action and found re-

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[3] The PEB was convened under the provisions of 10 U.S.C. 1201 *et seq* and implementing Army regulations, i.e. Army Regulations 635-40A, dated August 13, 1957 and Army Regulations 635-40B, dated August 13, 1957.

[4] See: 10 U.S.C. 1202.

spondent fit for duty, i.e. not disabled (Ct.Cl. Pet., Para. 5, P. 2). On July 7, 1959 respondent rebutted the PRC findings (Ct.Cl. Pet., Para. 6, Page 3). On July 21, 1959 the Army Physical Disability Appeal Board (APDAB)[5] concurred with the APRC and, as a result, respondent was retired for longevity on July 31, 1959 (Ct.Cl. Pet., Para. 7, Page 3) under the provisions of 10 U.S.C. § 3911, § 3991 rather than 10 U.S.C. § 1201 *et seq.*

(2) On August 22, 1959 respondent filed an application for correction of military records with the Army Board for Correction of Military Records (ABCMR) requesting his records be corrected to show him retired by reason of physical disability (Ct.Cl. Pet., Para. 8, Page 3).[6] The ABCMR held a hearing on January 25, 1961 (Ct.Cl. Pet., Para. 14, Page 4). Thereafter, the application was formally denied by the Under Secretary of the Army on May 19, 1961 (Ct.Cl. Pet., Para. 16, Page 4).

Having accrued over thirty years of service for pay purposes, the gross amount of respondent's longevity retirement pay is equal to 75% of the monthly basic pay of a Colonel. Were plaintiff retired by reason of physical disability (either pursuant to the disability evaluation proceedings conducted prior to retirement or pursuant to a retroactive correction of his records[7]) the maximum

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[5] The petition (Pet. 3) alleges the Physical Disability Review Board, rather than the Physical Disability Appeal Board, considered respondent's case subsequent to retirement. This is in error. The Physical Disability Appeal Board considered respondent's case on July 21, 1959 prior to his retirement on July 31, 1959.

[6] The application was filed under the provisions of 10 U.S.C. § 1552 and Army Regulations 15-185, dated July 18, 1955, the Army's implementing regulation.

[7] Had the application under 10 U.S.C. § 1552 been granted respondent's records would have been retroactively corrected to show his retirement by reason of physical disability on July 31, 1959. If his records had been corrected to show retirement by virtue of such a retroactive correction of his records respondent would have been paid all physical disability retired pay due from July 31, 1959

disability retirement pay rate (i.e. 75%) would have been, and would be, the same as that for longevity. The action of the Secretary of the Army (acting by and through the PEB, APRC and APDAB prior to July 31, 1959, and the Under Secretary and ABCMR subsequent to July 31, 1959) denied respondent that portion of his retired pay which if retired for physical disability is automatically exempt from income taxation under 26 U.S.C. § 104(a)(4) (Pet. 2A).

Respondent brought this action in the Court of Claims, alleging that "[t]he action of the Secretary of the Army in failing to grant plaintiff physical disability retirement pay was arbitrary, capricious, not supported by the evidence and contrary to law and regulation" (Ct.Cl. Pet., Para. 17, Page 5). Respondent seeks a "judgment against defendant for physical disability retirement with retired pay equal to 75% of the pay of a Colonel * * * less such net retirement pay for years of service heretofore paid to plaintiff" (Ct.Cl. Pet., Page 6), i.e. "for the difference—equal to the federal taxes assessed on his retirement pay—between disability pay and the longevity compensation he has received after taxes" (Pet. 2A).

Petitioner's first affirmative defense was that the respondent's claim was "basically a claim for a refund of taxes" and, therefore, barred by respondent's failure to allege the filing of a timely claim for refund with the Internal Revenue Service under 26 U.S.C. § 7422(a). In acting on petitioner's motion to dismiss, the Court of Claims issued an order (Pet. 2A, n.1) upholding, in effect, the Government's first affirmative defense and suggested that the sole relief which respondent could then possibly have from the court would be a declaration of his right to be retired for physical disability and to have his records changed accordingly. Because of the history of

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as a result of the correction, the amount of which would have equaled the amount of the taxes withheld from his longevity retired pay.

the point in the Court of Claims (Part I, decision below, Pet. 4A-10A) and on account of petitioner's explicit challenge (in its motion to dismiss) to the Court's authority to give declaratory relief, the Court invited reconsideration (Pet. 3A) of the applicability of the Declaratory Judgment Act to the Court of Claims and respondent's case. The Court of Claims requested briefs on the applicability of the Declaratory Judgment Act to "this court and this case" (Pet. 2A, n.1). Briefs were filed and the point argued (Pet. 4). Thereafter, the Court rendered its opinion of February 16, 1968. In its opinion the Court of Claims accepted respondent's contention (Pet. 29A-30A) that this was not an action "with respect to federal taxes"; that the determination which respondent requests is not a determination of tax liability; that the interpretation and application of 26 U.S.C. 104(a)(4) is "totally irrelevant to the questions [respondent] seeks to place before [the Court of Claims]" noting (Pet. 30A, n.42) there was "no question that §104(a)(4) of the Internal Revenue Code would exempt his retirement pay for income tax if he were held retired for disability"; that the only question presented, or need be presented, relates to respondent's retirement from the Army; and that respondent's "tax motives have absolutely no bearing on the application of the declaratory remedy" (Pet. 30A).

The Court of Claims held that the Declaratory Judgment Act does apply to the Court of Claims and to this case (Pet. 29A). In rendering its decision the Court of Claims overruled its decision in *Twin Cities Properties, Inc.* v. *United States*, 81 Ct.Cl. 655 (1935) (Pet. 13A) wherein it was held that the Declaratory Judgment Act (48 Stat. 955, 1934) did not apply.

In determining that the Declaratory Judgment Act applied the Court stated (Pet. 22A):

> "All we hold today is that claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast,

money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. That use of the Declaratory Judgment Act will surely not extend our jurisdiction or contravene 28 U.S.C. § 1491, *supra*. Whether there are other classes (i.e., non-money-related cases) in which a declaratory proceeding can validly be offered by this court we leave open for further development. At the least, plaintiff's category falls this side of the jurisdictional boundary."

The Court of Claims denied the motion to dismiss and granted respondent leave to amend his petition (Pet. 30A) "to seek explicitly a declaration of his right to be retired for disability and to have his military records changed". The case was "then to be returned to the trial commissioner for further proceedings". The petition was amended March 8, 1968. Petitioner filed a motion for reconsideration on March 15, 1968 and an answer to the amended petition on March 29, 1968. The motion for reconsideration was denied without opinion on June 14, 1968. Petitioner then filed its petition.

## ARGUMENT

The decision below is (A) plainly correct, (B) not in conflict with any court of appeals decision, and (C) of evidently small importance to the Government's functions or operations.

### I.

### The Decision Below Is Plainly Correct

The decision below which the Court is asked to review is plainly correct. The decision below reflects an appreciation of the express intent of the Congress that "any court of the United States" may employ the procedural remedy available under the Act. The United States Court of Claims is a "court of the United States" as defined in 28 U.S.C. § 451 so there can be no question that within

the bounds of the subject matter of its jurisdiction, the Court has access to the remedy provided for in the Declaratory Judgment Act.

In relation to the correctness of the decision below, respondent does not consider that he can; by argument, add to the exhaustively researched and compelling opinion of Judge Davis holding that the Declaratory Judgment Act applies to the Court of Claims and this case. Respondent merely notes here the outline of the opinion's development, in order that the arguments of the petition may be placed in context, and then offers comment on the petition.

The opinion of the United States Court of Claims on the issue of the applicability of the Declaratory Judgment Act follows this path: (1) The existing precedents contain no decision of the Supreme Court or of a court of appeals holding that the Court of Claims is without power to enter a declaratory judgment in cases within its Tucker Act jurisdiction. The Court of Claims so held in *Twin Cities Properties, Inc.* v. *United States*, 81 Ct.Cl. 655 (1935),[8] and that case has been followed, explicitly or implicitly, in two Court of Claims and two district court cases where the issue was squarely presented. *Twin Cities* has been ignored and declaratory judgments issued under a number of other statutes authorizing suit against the United States (Pet. 4A-10A).[9] (2) The precedents upon

[8] Prior to the revision and codification of the Judicial Code in 1948.

[9] Particularly noteworthy were Judge Davis' observations (Pet. 8A-9A) that in *Raydist Navigation Corp.* v. *United States*, 144 F.Supp. 503 (E.D.Va. 1956) it was held that a court having Tucker Act jurisdiction of actions against the Government may grant a declaratory judgment; and that, with respect to comparable Government litigation under the Federal Tort Claims Act, the remedy of a declaratory judgment was deemed to be "at least a 'procedural step' toward obtaining damages", citing *Pennsylvania R.R.* v. *United States*, 111 F.Supp. 80, 85-89 (D.N.J. 1953). In citing the latter authority, Judge Davis pointed out that the Tort Claims Act gives the district courts exclusive jurisdiction of "civil actions on claims against the United States, *for money damages*" 28 U.S.C. § 1346(b) (1964) (emphasis in original).

which the money judgment theory of *Twin Cities* rested dealt with specific equitable relief not requests for declaratory judgments; declaratory judgment procedures are entirely consistent with the historic jurisdiction and practice of the Court; declaratory judgments do not embody specific relief; the Court of Claims "money judgment" is itself merely declaratory; to countenance declaratory proceedings in the Court of Claims would not subject the Government to strange and alien practices, the United States has instituted many declaratory proceedings[10] and declaratory relief against the public officer is commonplace (Pet. 12A-18A). (3) Declaratory procedures do not go to jurisdiction and their availability cannot and will not be used to expand the subject matter jurisdiction of the Court of Claims beyond the money-related confines of the Tucker Act. The essential elements of a "claim" under the Court's jurisdictional statute (28 U.S.C. § 1491 (1964)) historically involve controversies with a money cast; that for a suit to have a money cast does not require that the plaintiff immediately seek such a judgment (Pet. 19A-22A). (4) The 1948 revision and codification of the Judicial Code added a new Section 451 (28 U.S.C. § 451) expressly including the Court of Claims in the term "court of the United States". Since the Declaratory Judgment Act, as revised, allows "any court of the United States" to grant declaratory relief, the 1948 Code undeniably indicates, if its phrasing is taken at face value, that the Court of Claims possesses the power to issue a declaratory judgment. Nothing in the legislative history indicates that the words should not be accepted as they

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[10] In this regard, it is most significant that on September 27, 1968, in the case of *United States* v. *Reynolds Metals Company*, (Civil Action 2421-68) the petitioner here filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment under the provisions of the Declaratory Judgment Act (28 U.S.C. § 2201) in litigation involving a claim of $7,898,479.00. By praecipe filed October 25, 1968, the action was dismissed without prejudice in view of institution of litigation "on the same claim" by *Reynolds Metals Company* in the United States Court of Claims.

were used (Pet. 23A-28A). (5) The determination which respondent requests [4] is not a determination of tax liability. The interpretation and application of tax statutes is totally irrelevant to the questions he seeks to place before the Court. The only questions respondent presents, or need present, relate to his retirement from the Army. Those are the only issues with which the Court of Claims would treat in its further proceedings in the case. In the circumstances, respondent's tax motives have absolutely no bearing on the application of the declaratory remedy (Pet. 29A-30A).

From the wealth of material organized in the decision below, the petitioner selects only two areas for attack, and that attack is of formulary rather than substantive nature.

The main thrust of the petitioner is its first argument that the Declaratory Judgment Act does not expand the jurisdiction of any court (Pet. 5-7). The court below and the respondent agree.[12]

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[4] Whether he should have been retired by reason of physical disability and whether his records should have been corrected, under 10 U.S.C. § 1552, to show his retroactive retirement by reason of physical disability, whereby all of his retired pay, retroactively to moment of disability retirement on July 31, 1959, would have been deemed disability retired pay.

[12] It is well established that the "operation of the Declaratory Judgment Act is procedural only" (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 1937), a fact which petitioner itself recognizes (Pet. 6). As was pointed out by Judge Davis: "The Supreme Court has unequivocally held that, with the enactment of the federal statute, 'Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction' ". The opinion below (Pet. 19A) points out that this Court said that "jurisdiction" in this context "means the kinds of issues which give right of entrance to federal courts". *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). As the opinion below also noted (Pet. 19A, n.26), in *Skelly Oil Co.* v. *Phillips Petroleum Co., supra*, the Court added: "The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked." (339 U.S. at 671-672).

The petitioner goes on, however, to assert that the Court of Claims has jurisdiction only to enter a "money judgment" (Pet. 7-8). Nothing in 28 U.S.C. § 1491 so provides. Moreover, the petition is completely silent as to the interrelationship of the precise language of 28 U.S.C. § 451 and 28 U.S.C. § 2201 with the provisions of 28 U.S.C. § 1491. Instead, the petition relies on the shorthand which originated in *United States* v. *Alire*, 6 (73 U.S.) Wall. 573 (1867), and *United States* v. *Jones*, 131 U.S. 1 (1889).[13] In a similar vein, the petition cites *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962) (Pet. 7) wherein it was held: "From the beginning it [the Court of Claims] has been given jurisdiction only to award damages * * *." (At Page 557). In this regard, it is to be noted that the sole authorities relied on by the Court in *Glidden* were *United States* v. *Alire*, *supra* (1867) and *United States* v. *Jones*, *supra* (1889) both decided before the 1934 statute and the 1948 Code revision. Equally significant, the Court in *Glidden Co.* v. *Zdanok*, did not address itself to the applicability of the Act to the Court of Claims. To supplement its money judgment argument petitioner points to other cases (Pet. 7) which held that the Court of Claims could not issue mandamus,[14] could not determine an equitable claim for relief,[15] could not remand a case to an administrative agency,[16] could not direct specific performance,[17] and could not grant nomi-

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[13] Both *Alire* and *Jones* were decided long before the enactment of the Declaratory Judgment Act in 1934, and the revision and codification of the Judicial Code in 1948 whereby the Declaratory Judgment Act was amended to include "any" court of the United States, and the inclusion of the United States Court of Claims within the definitions of 28 U.S.C. 451 pertaining to "courts of the United States".

[14] *United States* v. *Alire*, *supra* (1867).

[15] *Bonner* v. *United States*, 9 (76 U.S.) Wall. 573 (1869).

[16] *United States* v. *Jones, Receiver*, 336 U.S. 641 (1949).

[17] *United States* v. *Jones*, 131 U.S. 1 (1889).

nal damages.[18] All of these cases, with the exception of *United States* v. *Jones, Receiver, supra*, were decided before the 1948 Judicial Code revision. In *United States* v. *Jones, Receiver*, decided April 18, 1949, while referring to the short-hand "money judgment" jurisdiction of the Court of Claims in comparison to district courts, and in noting the provision for judicial review under the Administrative Procedure Act (§ 10, 60 Stat. 243, June 11, 1946, 5 U.S.C. 701, *et seq.*) (including declaratory judgments), the Court did not consider, or speak of, the applicability of the Declaratory Judgment Act to the Court of Claims in the light of the 1948 Code revision providing that the Declaratory Judgment Act applies to "any" court of the United States (336 U.S., at Pages 671-672). Petitioner cites *Rolls-Royce Ltd., Derby, England* v. *United States*, 176 Ct.Cl. 694, 364 F.2d 415, decided July 15, 1966 (Pet. 8), in support of its claim that the Court of Claims itself has held that it had no jurisdiction to enter declaratory judgments. A reading of the holding in *Rolls-Royce Ltd., Derby, England* v. *United States* shows that the Court did not rule that the Declaratory Judgment Act does not apply to the Court of Claims.[19]

After the Declaratory Judgment Act a claim looking to the payment of money can result in either a money judgment or a declaratory order. The subject matter of the jurisdiction of the Court of Claims is not in any way

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[18] *Grant* v. *United States*, 7 (74 U.S.) Wall. 331, 338 (1868); *Marion & Rye Valley Railway Co.* v. *United States*, 270 U.S. 280 (1926); *Nortz* v. *United States*, 294 U.S. 317, 327 (1935); *Perry* v. *United States*, 294 U.S. 330, 355 (1935).

[19] In its opinion the Court indicated that it was only concerned with the resolution of a jurisdictional question in connection with a counterclaim between two private parties (i.e. intervenor's counterclaim against plaintiff). There, the Court of Claims held that this portion of the counterclaim went beyond the jurisdiction of the Court since the Court had no jurisdiction over a private party's action for breach of contract against the plaintiff and that it followed that the Court could not circumvent its lack of jurisdiction by granting the private party the relief it sought under the Declaratory Judgment Act.

enlarged by this additional remedy. If the action is within the Tucker Act, the only inquiry is whether there is any reason to believe that the Congress did not intend the declaratory remedy to be available, as it provided in terms in 1948. The opinion below shows comprehensively and clearly that the remedy is entirely appropriate to Tucker Act proceedings and the petition offers nothing to the contrary.

The petitioner's second argument is that the decision amounts to a waiver of sovereign immunity not expressly sanctioned by statute (Pet. 9-10).[20] Insofar as this petition is concerned this is simply a rephrasing of its "money judgment" argument. As 28 U.S.C. § 1491 authorizes suits on, e.g. any regulation of an executive department, no additional waiver is required in authorizing in such a suit declaratory relief as well as a so-called "money judgment" which is itself simply a non-coercive declaration that the plaintiff should be paid by the accounting officials. Again, petitioner has failed to reconcile the very clear language of 28 U.S.C. § 451, 28 U.S.C. § 2201, and 28 U.S.C. § 1491. In simplest terms, 28 U.S.C. § 451 includes the Court of Claims within the definition of "courts of the United States". 28 U.S.C. § 2201 provides that "any court of the United States" may "declare the rights and other legal relations of any interested party seeking such declaration" in a matter within its jurisdiction and, as in this case, the Court of Claims, under 28 U.S.C. § 1491 has jurisdiction to render judgments, among other things, with respect to "any regulation of an executive department". Clearly, no new jurisdiction and no new subject matter is added by expanding the procedural remedy. Moreover, petitioner also ignores those cases wherein it has instituted proceedings seeking declaratory relief which, insofar as respondent knows, and as aforementioned, occurred most recently in Tucker Act type of litigation filed in the United States District Court for the

[20] The opinion below carefully reviewed this point (Pet. 4A-8A).

District of Columbia in *United States* v. *Reynolds Metals Company* (CA 2412-68) on September 27, 1968.

In addition to the foregoing considerations, respondent notes that the petition takes no issue with the careful review of the legislative history of the Declaratory Judgment Act by the court below (Pet. 24A-28A). Nor does it comment upon a subsequent legislative development. S.1704, 90th Congress, would authorize the Court of Claims to issue all orders available to a district court in a suit against the United States. S.1704 did not reach the House Committee for consideration (the 90th Congress adjourned October 14, 1968) but passed the Senate on July 29, 1968 after a report which accepted as correct the present decision.[21] In this regard, a significant corollary to the recognition by the Court of Claims of the applicability of the Declaratory Judgment Act is that it precludes the necessity for a litigant in the Court of Claims "splitting" his cause of action in order to seek declaratory relief in one forum and money damages in another forum. Ultimately, this would inevitably entail a reduction in the duplication and multiplicity of litigation which is ever pressing on the federal judiciary.

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[21] S. Rpt. No. 1465, 90th Cong., 2d Sess. (July 25, 1968), p. 3, reads:

"Declaratory judgment actions also present an area in which there is a need to broaden the Court of Claims remedial power. In *John P. King* v. *United States* (Ct. Cl. 1968), the power of the Court of Claims to grant declaratory judgments pursuant to 28 U.S.C. 2201-2202 was established. However, at present the power of the court to grant further relief as an adjunct to its declaratory judgments is not clear. The enactment of S. 1704 will broaden the relief which the court can give a claimant pursuant to 28 U.S.C. 2202 where the court decides that a claimant is entitled to a declaratory judgment but cannot recover any money. For example, an illegally discharged Government employee may, after the passage of S. 1704, bring a suit in the Court of Claims to recover back pay and, at the same time, seek restoration of his former position. If the evidence demonstrates that the employee's earnings during the period of his illegal discharge exceeded his Government pay, the court's judgment on the illegal discharge would be limited to a declaratory judgment, but it could as an incident of such a judgment order him reinstated."

## II.

### The Decision Below Is Not In Conflict With Courts Of Appeals Decisions

The petition marshalls 10 cases of courts of appeals which it asserts to be in conflict with the decision below (Pet. 8, 10) in relation to "want of a claim of money damages". (Pet. 8) and the Declaratory Judgment Act not applying to suits against the United States (Pet. 10). These issues were weighed in the decision below (Pet. 4A-8A). None of the cases cited in the petition represents a conflict of decision, either in terms of the issues decided or the language used, especially in the light of the 1948 Code revision.

In eight of these cases the underlying controversy was held to be outside the court's jurisdiction. The actions were to compel employment in the Government,[22] to assert in the district court pay and compensation claims which by the Tucker Act at the time (1945, 1954) were confined exclusively to the Court of Claims,[23] to review agency action where the statute precluded, or was thought to preclude, review,[24] to fix for federal tax purposes the allocation of partnership income,[25] to declare the good time allowance of a federal prisoner who had not exhausted his administrative remedies and presented no actual contro-

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[22] *Love* v. *United States*, 108 F.2d 43 (CA 8, 1939), cert. denied, 309 U.S. 673 (1940).

[23] *DiBenedetto* v. *Morgenthau*, 148 F.2d 223 (CA DC, 1945); *Powers* v. *United States*, 218 F.2d 828 (CA 7, 1954). 28 U.S.C. § 1346(d)(2) was amended by P.L. 88-519, 78 Stat. 699, August 30, 1964, which eliminated provisions which prohibited district courts from exercising jurisdiction of civil actions or claims (up to $10,000.00 as provided in 28 U.S.C. § 1346(a)(2)) to recover fees, salary, or compensation for official services of officers or employees of the United States.

[24] *Wells* v. *United States*, 280 F.2d 275 (CA 9, 1960).

[25] *Wilson* v. *Wilson*, 141 F.2d 599 (CA 4, 1944).

versy [26] to prevent the sale of Government-owned property,[27] and to declare wheat quota legislation unconstitutional.[28] The ninth case involved a suit for specific relief of an equitable character (i.e. to declare void an assignment of certain letters patent).[29] The tenth case involved a claim where judicial review was expressly prohibited by the statute under which benefits were claimed.[30] From the premise that there was no jurisdiction of the subject matter, neither the court below nor the respondent would reach a different result in that regard.

In the five cases cited in the petition (Pet. 8) relative to a "want of a claim for money damages",[31] one involved a claim where judicial review was expressly prohibited;[32] two did not involve claims for money damages;[33] and two involved claims which by the Tucker Act at the time (1945, 1954) were confined exclusively to the Court of Claims.[34]

The petition cites eight cases (Pet. 10) in relation to the Declaratory Judgment Act not applying to the United States.[35] Four of the cases [36] were decided before the 1948

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[26] *Gibson* v. *United States*, 161 F.2d 973 (CA 6, 1947).

[27] *Anderson* v. *United States*, 229 F.2d 675 (CA 5, 1956).

[28] *Stout* v. *United States*, 229 F.2d 918 (CA 2, 1956).

[29] *Clay* v. *United States*, 210 F.2d 686 (CADC, 1953) (cert. denied, 347 U.S. 927 (1954)).

[30] *Blanc* v. *United States*, 244 F.2d 708 (CA 2, 1957) (cert. denied, 355 U.S. 874 (1957)).

[31] *Blanc*, note 30; *Anderson*, note 27; *DiBenedetto*, note 23; *Powers*, note 23; *Clay*, note 29.

[32] *Blanc*, note 30.

[33] *Anderson*, note 27; *Clay*, note 29.

[34] *DiBenedetto*, note 23; *Powers*, note 23.

[35] *Stout* (1956), note 28; *Wilson* (1944), note 25; *Anderson* (1956), note 27; *Powers* (1954), note 23; *Love* (1939), note 22; *Wells*, note 24; *DiBendetto* (1945), note 23; and *Gibson* (1947), note 26.

[36] *Love* (1939), note 22; *Wilson* (1944), note 25; *DiBenedetto* (1945), note 23; *Gibson* (1947), note 26.

Code revision relative to the Declaratory Judgment Act applying to "any" court of the United States. The four other cases [37] did not comment on the 1948 change in the Declaratory Judgment Act providing that "any" court of the United States may grant declaratory relief which includes the Court of Claims. This argument also ignores petitioner's own recognition that the Declaratory Judgment Act applies to petitioner as evidenced by the cases wherein it has itself initiated suits for declaratory relief such as was filed by petitioner in the United States District Court for the District of Columbia on September 27, 1968,[38] 24 days before it filed its petition in this case.

From the foregoing, it is abundantly clear there is no conflict between the decision below and the cases relied on by petitioner. No more is any conflict likely to arise, or need arise, in the future. The Court of Claims will normally be accepted as authoritative with respect to practice under the Tucker Act, and the opinion of Judge Davis would in any event compel respect.

## III.

### Decision Of Small Importance To Government's Functions Or Operations

The decision below, in holding that the Declaratory Judgment Act applies to the United States Court of Claims, does not present an issue of general importance nor does it present any special or important reasons to warrant exercise of the Court's jurisdiction. Founded upon a most exhausive assessment of governing law and precedent the decision below merely represents the resolution of the very narrow point that the Declaratory Judgment Act applies to the United States Court of Claims in proceedings within its jurisdiction as set forth in 28

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[37] *Powers* (1954), note 23; *Stout* (1956), note 28; *Anderson* (1956), note 27; *Wells* (1960), note 24.

[38] *United States* v. *Reynolds Metals Company, supra*, note 10.

U.S.C. § 1491. The decision below demonstrates that the United States Court of Claims, as in the case of "any" other "court of the United States" may employ this "additional procedural tool" to matters within its jurisdiction. Contrary to petitioner's assertion (Pet. 5) the Court of Claims has not decided "an important jurisdictional issue in a manner that materially enlarges the subject matter jurisdiction which it has traditionally exercised under the Tucker Act, 28 U.S.C. § 1491". There is nothing in the decision below to suggest, indicate, or infer the Court will, or intends to, adjudicate matters beyond its jurisdiction. Specifically, in this regard, the Court of Claims pointed out that "use of the Declaratory Judgment Act need not, and will not, be used to expand the classes of claims or issues which this court may consider" (Pet. 19A).

In petitioner's endeavor to overcome the patent showing in the decision below that the Declaratory Judgment Act does apply to the United States Court of Claims, it is noteworthy that in its first application (of August 30, 1968) for an extension of time within which to file its petition for a writ of certiorari petitioner advanced as its sole ground:

> "It has been necessary to consult numerous Federal agencies in order to determine the potential impact of this decision. Additional time is required to allow study of these views and, if it is decided to file a petition, to prepare and print it."

The petition is devoid of a showing the decision below has generated, or will generate, any "potential impact" (to say nothing of an actual impact), as shown by consultation with "numerous federal agencies", upon petitioner's functions or operations. In connection with petitioner's attempt to show an involvement in "a broad variety of cases not involving claims for money damages" (Pet. 11-12), it appears that the Court of Claims had authorized

two plaintiffs an opportunity to amend their complaints to seek declaratory relief. In one, *Paulsen* v. *United States*, Ct.Cl. No. 327-67, the amended petition seeks credit for alleged involuntary sick leave or, in the alternative, $636.00 for a specific involuntary leave period. The other case, *Wilkerson* v. *United States*, Ct.Cl. No. 137-65, involved a claim for widow's benefits as affected by a discharge alleged to be wrongful.[39] The Government in each of the three maritime cases [40]—which involve money claims, and include a prayer for declaratory relief (Pet. 12) had on October 1, 1968 moved for summary judgment on the ground that the cause of action was non-justiciable. If it is right, the suits are not saved by the declaratory prayer. If the Government is wrong, there is no discernible harm to anyone in litigating a claim when it is fresh rather than awaiting the slow maturing of a specific money claim—after performance, audit, vouchers and refusals—some years later.[41] By the same token, no ground for apprehension is seen if federal contract claims could be settled by declaratory judgment even though "not giving rise to a ripe claim of money damages because the contract is not yet completed" (Pet. 13). It is supposed that if the sovereign consents to suit it would hardly comport with its dignity were it to urge that it meant to consent only to a long-delayed suit. As the Court stated in *Glidden Co.* v. *Zdanok*, *supra*, in quoting from President Lincoln's State of the Union message in 1861: "It is as

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[39] In *Wilkerson*, a judgment was entered for plaintiff in the amount of $2,916.00 on October 4, 1968 based on a stipulation filed October 1, 1968 wherein plaintiff agreed to accept $2,916.00 in [illegible] settlement of the claim. Obviously, this was a claim with a "m[illegible]cast" or was a "money related" claim.

[40] *American Export Isbrandsten Lines, Inc.* v. *United States*, Ct. Cl. No. 75-68; *American President Lines, Ltd.* v. *United States*, Ct. Cl. No. 55-68; *Delta Steamship Lines, Inc.* v. *United States*, Ct. Cl. No. 74-68.

[41] Respondent does not, after *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), understand petitioner's concern that the plaintiffs seem to be seeking what "would essentially constitute a remand by the Court of Claims to the administrative agency" (Pet. 12).

much the duty of the Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals" (370 U.S. at Page 553).

With regard to petitioner's reference to "[o]ther examples" of the Court having "enlarged its jurisdiction" or possibly enlarging its jurisdiction by considering cases pertaining to federal tax liabilities, and citing respondent's case as being indicative of same (Pet. 13), reference need only be made to the keen awareness of the Court of Claims of the exclusion of cases "with respect to federal taxes" in the Declaratory Judgment Act as evidenced in the opinion below (Pet. 29A-30A).

In the ultimate, a review of all of the points and authorities raised by petitioner fails to affirmatively show the decision below was in error in holding that the Declaratory Judgment Act does apply to the United States Court of Claims or that in availing itself of this remedy it will engage in matters beyond the subject matter of its jurisdiction.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 672

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. KING

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## REPLY BRIEF FOR THE UNITED STATES

We submit this reply brief to discuss the contention that forms the linchpin of respondent's brief in opposition: his claim that Section 451 of the Judicial Code, 28 U.S.C. 451, justifies the holding of the Court of Claims that it has jurisdiction to grant declaratory judgments against the United States.

The argument is as follows: because the Declaratory Judgment Act allows "courts of the United States" to issue declaratory judgments, and Section 451 defines "court of the United States" as "including the Court of Claims", respondent concludes that Congress explicitly conferred jurisdiction to issue declaratory judgments upon the Court of Claims.

The first defect in this analysis lies in its disre-

gard of the essential language of the Declaratory Judgment Act. That Act, 28 U.S.C. 2201, does not simply say that "any court of the United States" may enter a declaratory judgment. It says "[i]n a case of actual controversy *within its jurisdiction,* except with respect to Federal taxes, any court of the United States" may grant such relief. As we pointed out in our petition, this case is not within the subject matter jurisdiction of the Court of Claims, because respondent is not in a position to claim a money judgment. As we also pointed out, this case is within the express exception of the Declaratory Judgment Act, because it is in substance a "controversy * * * with respect to Federal taxes." Moreover, there is no statutory waiver of sovereign immunity that would permit suits for a declaratory judgment to be brought against the United States.

It would be novel, indeed, if Section 451, which is merely a definitory provision, was intended by Congress to overcome two limitations directly expressed in the Declaratory Judgment Act as well as established rules governing the sovereign immunity of the United States. Respondent's position that Section 451 plays such a extraordinary role rests on a mistaken view of that Section's history and would stretch the Declaratory Judgment Act to a point wholly inconsistent with any prior view of its function.

The error of history is the assertion (Respondent's Br. 9) that "the 1948 revision and codification of the Judicial Code added a new Section 451 * * * expressly including the Court of Claims in the term

"court of the United States'." Section 451 was not newly written in 1948 but rather originated in Section 308, added to the prior Judicial Code enacted on August 7, 1939, Ch. 501, 53 Stat. 1225. That section was part of the act which established the Judicial Conference and other machinery for dealing with the administrative problems of the United States courts. See S. Rep. No. 426, 76th Cong. 1st Sess. Nothing in the legislative history suggests that Congress had any intention of extending in this statute the United States' waiver of sovereign immunity so as to allow declaratory judgments against it in the Court of Claims or in any other federal tribunal. Before and after that statute was adopted, the Court of Claims has, as our petition points out, held on numerous occasions that it had no jurisdiction to enter declaratory judgments, and the courts of appeals have held the same is true of the district courts.

Furthermore, the logic of respondent's position would require the conclusion that a declaratory judgment may be entered by any tribunal listed in Section 451 as a "court of the United States." Thus, this Court, the courts of appeals, the Court of Customs and Patent Appeals, and the Customs Court would all be granted such jurisdiction, although the Declaratory Judgment Act is not intended to have such a result.

The only reasonable conclusion is what the language of the Declaratory Judgment Act directly requires: that the authority of a federal court to enter a declaratory judgment is limited to contro-

versies that are within that court's subject matter jurisdiction, as defined by other provisions. As we have shown in our petition, this case is not within the subject matter jurisdiction of the Court of Claims and that court, therefore, may not enter a declaratory judgment. As we have also shown, this same conclusion will hold true of any case in the Court of Claims, *first,* because all such cases are against the United States, and *second,* since, if a money judgment is available, declaratory relief is inappropriate, and if one is not available, the Court of Claims is without subject matter jurisdiction.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 672

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. KING

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 12–40) is reported at 182 Ct. Cl. 631, 390 F. 2d 894.

### JURISDICTION

The decision of the Court of Claims was entered on February 16, 1968 (R. 12). The government's timely motion for reconsideration was denied on June 14, 1968 (R. 2). On September 5, and October 3, 1968, the Chief Justice extended the time for filing a petition for a writ of certiorari respectively to and including October 11, and October 21, 1968. The petition was filed on October 21, 1968, and was granted

on January 13, 1969 (R. 43). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether the Declaratory Judgment Act, 28 U.S.C. 2201, grants the Court of Claims jurisdiction to enter declaratory judgments against the United States.

## STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> § 1491. Claims against United States generally. * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * * *

The Declaratory Judgment Act, 28 U.S.C. 2201, provides in pertinent part:

> § 2201. Creation of remedy.
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> * * * * *

STATEMENT

Respondent, Colonel John P. King, was retired from the Army in 1959 for longevity. Subsequently, the Secretary of the Army, acting through the Physical Disability Appeal Board and the Board for Correction of Military Records, rejected respondent's contention that he should have been retired for disability. Although respondent is entitled to retirement pay of seventy-five percent of his basic pay as a colonel regardless of the basis for his retirement,[1] disability retirement would have entitled him to the exemption from income taxation that Section 104(a)(4) of the Internal Revenue Code of 1954 allows pensions based on a service-connected disability (R. 13).

Respondent brought this action in the Court of Claims, alleging that "[t]he action of the Secretary of the Army in failing to grant plaintiff physical disability retirement was arbitrary, capricious, not supported by the evidence and contrary to law and regulation" (R. 6). He sought a "judgment against defendant for physical disability retirement with retired pay equal to 75% of the pay of a Colonel * * * less such net retirement pay for years of service heretofore paid to plaintiff" (R. 6–7), *i.e.*, for an amount equal to "the federal taxes assessed on his retirement pay" (R. 13). He has never brought suit in a district court for the purpose of compelling the Secretary of the Army or other responsible official to reopen his case or to change his record to reflect a disability retirement.

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[1] *Compare* 10 U.S.C. 3911, 3991 *with* 10 U.S.C. 1201, 1401.

The Court of Claims accepted the government's contention that this was "basically a claim for a refund of taxes" and was, therefore, barred by respondent's failure to allege the filing of a timely claim for refund with the Internal Revenue Service (R. 7–8, 13).[2] See 26 U.S.C. 7422(a). Rather than dismissing the complaint, the court issued an order suggesting that "the only possible basis upon which the case can be maintained is under the Declaratory Judgment Act," and requested "briefs on the applicability of that Act to this court and this case" (R. 12).

After briefs were filed and the point argued, the Court of Claims held that it had the power to grant declaratory judgments against the United States. Rejecting government contentions that its jurisdiction is limited to the granting of money judgments and that the Declaratory Judgment Act does not apply to suits against the United States, the Court of Claims overruled a line of its own decisions beginning with *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655, and held (R. 32):

> * * * claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast, money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. * * *

[2] Respondent in fact had not filed such a claim (R. 13).

The court therefore denied the motion to dismiss and granted respondent leave to amend his petition "to seek explicitly a declaration of his right to be retired for disability and to have his military records changed." The case was "then to be returned to the trial commissioner for further proceedings." (R. 40.)

## SUMMARY OF ARGUMENT

The Court of Claims' jurisdiction to grant declaratory judgments or any other relief depends entirely on the extent to which the United States has waived its sovereign immunity to suit. Such a waiver must be plain and explicit; it cannot be inferred or implied. Two statutes—the Declaratory Judgment Act and the Tucker Act—provide the only possible sources of the waiver that would be necessary to support the decision below.

These statutes do not authorize declaratory judgments against the United States, either in the Court of Claims or in any other tribunal. In the Declaratory Judgment Act itself, Congress did not intend to broaden the subject matter jurisdiction of the federal courts, but only created an additional remedy in cases where a trial court already had such jurisdiction. In terms of the present case, this means that the essential point of reference is the part of the Tucker Act which confers jurisdiction on the Court of Claims.

This Court, in a long line of cases, has consistently ruled that the Court of Claims' jurisdiction extends only to controversies where the claimant asserts a present right to receive money from the United States. This is not such a case. Until the present case,

the Court of Claims had long agreed that neither the Declaratory Judgment Act nor the Tucker Act authorizes it to grant declaratory judgments. All the courts of appeals which have considered the issue agree that neither the part of the Tucker Act which grants the district courts concurrent jurisdiction with the Court of Claims over certain disputes nor the Declaratory Judgment Act allows a district court to enter a declaratory judgment against the United States. Indeed, to rule otherwise would be inconsistent with the rationale of *United States* v. *Sherwood,* 312 U.S. 584.

Moreover, permitting the Court of Claims to render a declaration of respondent's rights in the present procedural context would in several ways contravene the settled limits on its authority. For example, the court would in substance be granting equitable relief although Congress has always declined to grant it such power.

For these reasons, the decision below was erroneous and cannot stand. Like all other persons alleging that a federal official acted outside his authority or contrary to a statute or regulation, respondent should be limited to an action for equitable relief against that official in a district court.

## ARGUMENT

It is axiomatic that the United States may not be sued "save as it consents to be sued * * * and the

terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood,* 312 U.S. 584, 586. The consent to suit must be unequivocally and directly expressed. A waiver of sovereign immunity cannot be implied. See *id.,* 589–591; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371; *Lynch* v. *United States,* 292 U.S. 571, 581–582. Thus Congress has always cast waivers of sovereign immunity in explicit and unmistakable terms—as, for example, in the Tucker Act, 28 U.S.C. 1346(a), 1491; the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671–2680; and the Suits in Admiralty Act, 46 U.S.C. 742.

The Court of Claims' jurisdiction is limited to suits against the United States. Apart from the authority expressly conferred by statute, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood, supra,* 312 U.S. at 587–588. In consequence, the resolution of this case requires analysis of the Declaratory Judgment Act and the Tucker Act, which are the only possible sources of the waiver of sovereign immunity that is necessary to sustain the instant decision of the Court of Claims. We shall discuss each of these statutes and show that neither separately nor in combination do they allow the Court of Claims to act in any case where the claimant is unable to put forward a claim for presently due money damages.

I. THE DECLARATORY JUDGMENT ACT DOES NOT WAIVE THE IMMUNITY OF THE FEDERAL SOVEREIGN BUT MERELY ALLOWS A TRIAL COURT TO DECLARE RIGHTS WHERE SOME OTHER STATUTE GRANTS JURISDICTION OF THE SUBJECT MATTER

The Declaratory Judgment Act does not contain the explicit waiver of sovereign immunity that is essential to provide a source of jurisdiction for the Court of Claims to declare respondent's rights with respect to the Secretary of the Army's refusal to amend his military records. On its face, that statute is only what Congress called it in adding a clause barring declaratory judgments in federal tax cases: "a procedure designed to facilitate the settlement of private controversies."[3]

Although the Act was adopted in 1934, 48 Stat. 955, to assist "in avoiding the necessity * * * of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages,"[4] the Act was not intended to enlarge the subject matter jurisdiction of the federal courts. "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240. In other words, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671. See, also, *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 264; *United States* v. *West Vir-*

[3] S. Rep. No. 1240, 74th Cong., 1st Sess. 11.

[4] S. Rep. No. 1005, 73d Cong., 2d Sess. 2; see, also, H. Rep. No. 1264, 73d Cong., 2d Sess. 2.

*ginia*, 295 U.S. 463, 475; Borchard, *Declaratory Judgments* (2d ed.) p. 233; 6A Moore, *Federal Practice* ¶ 57.23, p. 3136. Nothing in the legislative history of the Declaratory Judgment Act negates this view. On the contrary, the Act was reworded in 1948 to provide expressly, as it still does, that a federal court may grant such a judgment only "[i]n a case of actual controversy *within its jurisdiction*" (emphasis supplied). 62 Stat. 964.[5]

In consequence, the Declaratory Judgment Act itself cannot be a fountainhead of subject matter jurisdiction for the federal courts. It makes available a new procedure, but that procedure is limited to cases that come within the jurisdictional limits established by other provisions of the Judicial Code.

II. THE JURISDICTION OF THE COURT OF CLAIMS IS LIMITED TO CLAIMS FOR THE PRESENT RECOVERY OF MONEY FROM THE UNITED STATES

The jurisdiction of the Court of Claims is now founded on the part of the Tucker Act codified in 28 U.S.C. 1491. It provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

[5] Similarly, the Uniform Declaratory Judgment Act, now in force in a majority of States, is limited to actions in "courts of record within their respective jurisdictions." See 6A Moore, *supra*, ¶ 57.02[1], pp. 3004–3005.

States, or for liquidated or unliquidated damages in cases not sounding in tort.[6]

As the tribunal created "primarily to relieve the pressure on Congress caused by the volume of private bills," *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 552, the court's jurisdiction has always been defined in terms of cases involving a "claim" against the federal government.[7] This Court has repeatedly held that this statutory formulation limits the jurisdiction of the Court of Claims to cases involving a demand for a money judgment. "From the beginning it has been given jurisdiction only to award damages * * *." *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 557. Thus the Court of Claims may not issue mandamus,[8] may not determine an equitable claim for money,[9] may not remand a case to an administrative agency,[10] may not direct specific performance,[11] and may not even grant nominal damages.[12] See, also, *United States* v. *Sherwood, supra,* 312 U.S. at 588.

This authority allows but one inference: that the Court of Claims must dismiss a case once it finds, as it

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[6] The Judicial Code also gives the Court of Claims jurisdiction of matters arising from "any unsettled account" of federal officers or contractors, 28 U.S.C. 1494, and in a variety of special situations not pertinent here, 28 U.S.C. 1495–1499.

[7] *E.g.*, Section 1 of the Act of February 24, 1855, 10 Stat. 612; Section 2 of the Act of March 3, 1863, 12 Stat. 765.

[8] *United States* v. *Alire*, 6 Wall. 573.

[9] *Bonner* v. *United States*, 9 Wall. 156.

[10] *United States* v. *Jones, Receiver*, 336 U.S. 641.

[11] *United States v. Jones*, 131 U.S. 1.

[12] *Grant* v. *United States*, 7 Wall 331, 338; *Marion & Rye Valley Railway Co.* v. *United States*, 270 U.S. 280; *Nortz* v. *United States*, 294 U.S. 317, 327; *Perry* v. *United States*, 294 U.S. 330, 355.

has here, that the claimant does not have a present right to receive money from the United States. To be sure, in adopting the Declaratory Judgment Act, the Congress drew an analogy to the Court of Claims' procedure, stating that "the decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution." S. Rep. No. 1005, 73d Cong., 2d Sess. 4–5. But such a "declaration" relates to a present right to payment from the United States, and in the absence of such a right, the Court of Claims has no power to declare that the claimant has other rights against the United States. As the Senate Committee said in the sentence immediately following the one just quoted, the Declaratory Judgment Act was intended to "simply extend declaratory relief to other cases, *provided the parties and subject matter are within the jurisdiction of the Federal courts.*" (Emphasis supplied.) Because the Court of Claims' jurisdiction ends if it determines that there is no present right to money, its power to declare rights ends at the same point.

In fact, until the decision below, the Court of Claims agreed with this analysis, in a number of cases that it has overruled here. Only one year after the passage of the Declaratory Judgment Act that court held that the Act in no way changed its powers (*Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655, 658):

> If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdic-

> tion from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised.

Accord, 6A Moore, *supra*, ¶ 57.02[4], pp. 3010–3011. This view was adhered to as recently as 1966. *Rolls-Royce Ltd., Derby, England* v. *United States*, 176 Ct. Cl. 694, 701–702, 364 F. 2d 415, 419–420.

Added authority for this position is found in the cases holding that the district courts may not enter declaratory judgments against the United States. Because the Tucker Act grants the district courts concurrent jurisdiction with the Court of Claims (28 U.S.C. 1346(a)(2)) in "[a]ny * * * civil action or claim against the United States, not exceeding $10,000 in amount founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *", it has been contended that the combined effect of the Tucker Act and the Declaratory Judgment Act is to allow the district courts to render declarations of rights against the United States.

Every court of appeals that has considered this contention—and a majority of the circuits has done so—has rejected it. Each has ruled that the district court's jurisdiction under the Tucker Act is limited to claims for actual, presently due money damages from the United States, and that Congress has not waived sovereign immunity to allow declaratory judgments in the absence of such a claim. *E.g.*, *Stout* v. *United States*, 229 F. 2d 918, 919 (C.A. 2), certiorari

denied, 351 U.S. 982; *Wilson* v. *Wilson*, 141 F. 2d 599, 600 (C.A. 4) (alternative holding); *Anderson* v. *United States*, 229 F. 2d 675, 677 (C.A. 5) (claim to condemned land); *United States* v. *Smith*, 393 F. 2d 318 (C.A. 5); *Love* v. *United States*, 108 F.2d 43, 50 (C.A. 8), certiorari denied, 309 U.S. 673; *Wells* v. *United States*, 280 F. 2d 275, 277 (C.A. 9); *Clay* v. *United States*, 210 F. 2d 686 (C.A.D.C.); see *Gibson* v. *United States*, 161 F. 2d 973, 794 (C.A. 6) (dictum); see generally 6A Moore, *supra*, ¶57.21[1], p. 3123.[13]

If anything, the case for declaratory relief against the United States is stronger in the district courts than in the Court of Claims. Each court's jurisdiction under the Tucker Act is identical.[14] But the district courts, unlike the Court of Claims,[15] have general equitable jurisdiction[16] and the Declaratory Judgment Act, generally speaking, applies to actions in the

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[13] The only contrary authority of which we are aware is *Raydist Navigation Corp.* v. *United States*, 144 F. Supp. 503 (E.D. Va.).

[14] *United States* v. *Sherwood*, *supra*, 312 U.S. at 590.

[15] See *Twin Cities Properties, Inc.* v. *United States*, *supra*, 81 Ct. Cl. at 658.

[16] This Court has characterized the declaratory judgment as equitable relief. *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431. See, also, *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 300; H. Rep. No. 1264, 73d Cong., 2d Sess. 2. But see 6A Moore, *supra*, ¶57.04, p. 3019. Regardless of the label placed upon it, a suit seeking such relief obviously does not involve a claim for money damages based upon the Constitution, statutes or regulations of the United States, and so cannot be distinguished from the actions brought in the cases cited in the text (*supra*, pp. 12-13) in which the Declaratory Judgment Act was held inapplicable to Tucker Act suits.

district courts.[17] The lack of jurisdiction of the Court of Claims to grant declaratory relief thus follows *a fortiori* from the court of appeals cases.

Moreover, the decision below is inconsistent with the rationale of *United States* v. *Sherwood*, *supra*, 312 U.S. 584. There the New York Supreme Court had authorized a judgment creditor to satisfy its judgment against a private debtor by a suit under the Tucker Act based on the judgment debtor's claim against the United States for an alleged breach of a government contract. In essence, the New York court, following New York statutory authority, assigned to the creditor part of the debtor's action against the United States. The judgment creditor then filed suit in the district court against the United States. Of course, he did not himself have a claim against the United States—the jurisdictional requisite of the Tucker Act. The theory was that the then new Federal Rules of Civil Procedure allowed the creditor to enforce his debtor's rights against the United States because Rule 17(b) provides that "capacity to sue" was governed by the law of the plaintiff's domicile, in that case New York.[18] The Second Circuit, reversing the district court, held that the latter had jurisdiction of the action.

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[17] Three courts of appeals have suggested that the district courts may grant "incidental" equitable relief in Tucker Act cases. *Clay* v. *United States*, 210 F. 2d 686 (C.A.D.C.); *Lynn* v. *United States*, 110 F. 2d 586 (C.A. 5); *Blanc* v. *United States*, 244 F. 2d 708 (C.A. 2). (We are unaware of any case in which such relief has been granted.) The Second Circuit in *Blanc* ruled (*id.* at 709), nevertheless, that declaratory relief is not the sort of "incidental relief in equity in aid of a judgment" that is permitted in a Tucker Act action.

[18] Fed. R. Civ. P. 17(b) still contains this provision.

This Court, however, held that the district court properly had dismissed the suit. Applying an analysis substantially the same as that given in this brief, see 312 U.S. at 587–591, the Court, speaking through Mr. Justice Stone, unanimously ruled that the Tucker Act did not waive the United States' sovereign immunity against suits by the creditor of a person having a Tucker Act claim. Although the provisions of Federal Rule 17(b) relating to capacity, if literally read, would have sustained jurisdiction, this Court held that such a procedural rule was an inadequate foundation on which to base a waiver of sovereign immunity because (312 U.S. at 591):

> [t]he matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. * * * The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

Similar reasoning governs this case. The Tucker Act does not waive the United States' immunity against actions for declaratory judgments. The Declaratory Judgment Act is procedural only, and does not expand the limited waiver of sovereign immunity in the Tucker Act.[19] The end result is that the immunity

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[19] Comparable proscriptions upon the operation of the Uniform Declaratory Judgment Act exist in the State courts. For example, it has long been recognized that State probate courts are not authorized to grant declaratory judgments. See Borchard, *supra*, pp. 247–248.

has not been waived and the Court of Claims should have dismissed this case.

### III. THE DECISION BELOW IS INCONSISTENT WITH THE HISTORICAL FUNCTIONS OF AND LIMITATIONS UPON THE JURISDICTION OF THE COURT OF CLAIMS

As we have indicated above, the Court of Claim's jurisdiction has always been a sharply limited one. It may declare whether a claimant has the right to collect money from the United States. But it may do no more—it may not even execute such a decision. Equally important, the decisions of this Court cited above and the history of the Court of Claims Act demonstrate that these limitations reflect a conscious policy determination by the Congress. The decision here, however, would allow the Court of Claims to hear and declare rights in a variety of situations that have always been thought beyond its powers. If the court's jurisdiction is thus to be enlarged, we suggest that Congress is the appropriate agency to do so.

1. The first factor is that Congress has never seen fit to allow the Court of Claims to grant equitable relief. When the Court of Claims was first established, Senator Pettit urged Congress to allow "either a legal or an equitable claim against the Government," Cong. Globe, 33d Cong., 2d Sess., p. 72, December 18, 1854, but it refused to do so, and limited the court to the subject matter formerly handled by Congress in private bills (*i.e.*, money claims). See *id.*, 105–114. Later, in urging Congress to grant finality to Court of Claims' decisions, President Lincoln noted the great number of claims against the government which were beginning

to arise out of the Civil War, and stated that "it was intended by the organization of the Court of Claims to remove this branch of business from the Halls of Congress * * *." Message to Congress, December 3, 1861, Cong. Globe, 37th Cong., 2d Sess., App., p. 2. As recently as the last session of Congress, a bill was proposed—and recommended by a committee which seemed to approve of the decision below—to allow the Court of Claims the same equitable powers as the district courts now possess, but the bill failed when it died in the House.[20]

Thus the Court of Claims' *raison d'etre* has been to relieve Congress of the burden of passing on claims for money against the United States. The Court's function is to sift those claims to determine which are meritorious and the amount of money that should be paid, and it may do no more.

In practical effect, however, the Court of Claims has here asserted the power to grant relief that is equitable in nature. It authorized respondent to seek "a declaration of his right to be retired for disability and *to have his military records changed*" (R. 40; emphasis supplied.) If the Court of Claims has jurisdiction to grant such relief, that declaration presumably would have *res judicata* effect as between respondent and the United States. The effect ultimately could be the same as the entry of a mandatory injunction against the

[20] S. 1704 was introduced for this purpose in the 90th Congress. See S. Rep. No. 1465, 90th Cong., 2d Sess. The bill passed the Senate, but not the House. See 114 Cong. Rec. 39662, July 29, 1968. Compare 28 U.S.C. 2202, not involved here, which gives federal courts the power to enforce declaratory decrees.

United States, *i.e.*, compelling the correction of respondent's records to show that he was retired for disability rather than longevity. Even the district courts could not grant such relief against the United States as such, but could act only in a suit against the officials whose actions are alleged to be unlawful. Cf. *United States* v. *Lee*, 106 U.S. 196; *Land* v. *Dollar*, 330 U.S. 731.

But even if the effect of permitting such relief is not so viewed, the result would in substance constitute a remand to an administrative officer, a remedy that has long been considered unavailable in the Court of Claims. See *United States v. Jones, Receiver, supra*, 336 U.S. 641. And once such jurisdiction is established, there would be no real basis for distinguishing between allowing a plaintiff the statutory remedy of a declaration of rights and granting him such equitable remedies as specific performance (forbidden in *United States* v. *Jones, supra*, 131 U.S. 1) or damages for unjust enrichment (forbidden in *Bonner* v. *United States, supra*, 9 Wall. 156).

2. Other enlargements upon the Court of Claims' jurisdiction that result from its decision below may be illustrated by a variety of cases that are now pending in that tribunal.

One, *Paulsen* v. *United States*, Ct. Cl. No. 327-67, involves a claim that the plaintiff was improperly placed on involuntary sick leave by the government agency for which she worked. Even though the Court of Claims seemed to agree with the government's position that a claim for sick leave cannot be converted

into money damages, it has issued an order allowing the plaintiff to avoid dismissal by amending her complaint to seek a judgment declaring that the agency's action was unlawful.

A second case, *Wilkerson* v. *United States*, Ct. Cl. No. 137–65, was thought to have become moot when a discharged electrician's mate who had brought a backpay action died, having worked between his discharge and his death for a civilian employer at a wage greater than his military salary. The Court of Claims, however, affirmed an order of a Commissioner that denied the government's motion for summary judgment, and suggested that the plaintiff's widow, who had been substituted as plaintiff in her capacity as administratrix, might amend to seek a declaration of her rights to widow's benefits, a question not before in issue.

In three cases [21] involving claims that shipbuilding subsidies awarded by the Maritime Subsidy Board were too low, the plaintiffs have pleaded, in the alternative, for a judgment declaring that they are entitled to an evidentiary hearing before the administrative agency with discovery of certain government cost estimates.[22] (In view of the decision in the present case, the government has not moved to strike that claim.)

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[21] *American Export Isbrandtsen Lines, Inc.* v. *United States*, Ct. Cl. No. 75–68; *American President Lines, Ltd.* v. *United States*, Ct. Cl. No. 55–68; *Delta Steamship Lines, Inc.* v. *United States*, Ct. Cl. No. 74–68.

[22] A trade association of steamship companies interested in the subsidy program appeared below as *amicus* in support of respondent. (See R. 14.)

*Paulsen* and *Wilkerson* obviously present circumstances where the Court of Claims could not grant a money judgment, and, without the asserted power to issue declaratory relief, would have no jurisdiction. For example, the correct course in *Paulsen* would have been to institute an injunctive action in the district court. Wilkerson's widow, on the other hand, should have been required to apply to the Navy for those widow's benefits to which she thought herself entitled. And in the ship subsidy cases, if damages are denied, a judgment declaring that there should have been an evidentiary hearing would again in essence constitute a mandatory order from the Court of Claims to an administrative agency.

3. Another area of concern is, as this case well illustrates, federal tax litigation. Respondent's retirement pay would be the same regardless of the basis for his retirement (R. 13). As his original complaint indicated, the only benefit he can obtain from the decision below is an exemption from income taxation under Section 104(a) of the Internal Revenue Code of 1954. We question whether the correct basis for respondent's retirement may be properly litigated in a tax refund case, for we should suppose that the tax collector must act on the basis of respondent's military records unless and until those records are changed through the proper procedures, *i.e.*, a suit in the distict court against the proper officials of the Department of Defense. Cf. *Ashe* v. *McNamara*, 355 F. 2d 277 (C.A. 1). Of course the Court of Claims is wholly without jurisdiction of such a case.

But assuming *arguendo* that such a point might be

raised in a tax suit—and that is the only manner in which this case could have the "money cast" the Court of Claims perceived here (R. 32)—maintenance of this litigation would violate an express bar written into the Declaratory Judgment Act. In 1935, Congress amended that Act to except from its coverage cases "with respect to Federal taxes," [23] language that is still in the statute.

The Court of Claims asserted (R. 39–40), however, that this is not a tax case because it does not involve "the interpretation and application of" the Internal Revenue Code. If this is so here, then there will be a large number of similar controversies where the courts might grant declaratory judgments even though the only reason for and effect of the controversy would be in federal tax liabilities, and the taxpayer has not followed the procedures established in the Internal Revenue Code. One such case, for example, would have been *Wilson* v. *Wilson, supra*, where the parties sought a judgment declaring partnership rights under State law, from which federal tax consequences would result. Thus, respondent's attempt to obtain tax relief notwithstanding his failure to file a timely claim for refund, see 26 U.S.C. 7422(a), is precisely what Congress intended to prevent in the 1935 amendment to the Declaratory Judgment Act. See S. Rep. No. 1240, 74th Cong., 1st Sess. 11; 6A Moore, *supra*, ¶ 57.16, p. 3089; cf. *Schilling* v. *Rogers*, 363 U.S. 666, 677; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 543.

[23] See Section 405 of the Revenue Act of 1935, 49 Stat. 1027.

## IV. THE DECISION BELOW IS INCONSISTENT WITH THE PURPOSES OF THE DECLARATORY JUDGMENT ACT

As we indicated above, the Declaratory Judgment Act was intended to create "a procedure designed to facilitate the settlement of private controversies".[24] Moreover, it was designed to allow judicial relief in private cases where traditional concepts forbade immediate suit for an injunction or damages. As the Congressional committee put it, it was intended to assist "in avoiding the necessity * * * of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages."[25]

Here, of course, the controversy is public rather than private. Equally important, a declaratory judgment is not required for the preservation, protection, or enforcement of respondent's rights. His basic contention is that the Secretary of the Army has acted (R. 6) "contrary to law and regulation." See *United States* v. *Lee,* 106 U.S. 196; *Land* v. *Dollar,* 330 U.S. 731, 736–738. The clear import of the respondent's allegations places him in the same position as any other plaintiff whose basic complaint is that the unlawful actions of a government official should be judicially remedied, and he should therefore have brought an action in a district court for declaratory, mandatory or injunctive relief against that official.

Thus, this case does not involve any of the traditional situations where a declaration of rights is per-

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[24] S. Rep. No. 1240, 74th Cong., 1st Sess. 11.

[25] S. Rep. No. 1005, 73d Cong., 2d Sess. 2; see also, H. Rep. No. 1264, 73d Cong., 2d Sess. 2.

mitted because it is preferable to forcing a party to act at his peril or abandon his rights. There is, for example, no written instrument involved which needs interpretation, no title to property in question, no patent being infringed, no security being dissipated. See generally Borchard, *Declaratory Judgments* (2d ed.). Respondent is simply attempting to litigate an ordinary claim of improper action by a federal official in a tribunal which Congress has not authorized to hear such actions and which therefore should have dismissed respondent's suit.

## CONCLUSION

The judgment of the Court of Claims should be reversed with directions to dismiss this case.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

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No. 672

UNITED STATES OF AMERICA,
*Petitioner,*

v.

JOHN P. KING,
*Respondent.*

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**On Writ Of Certiorari To The United States Court Of Claims**

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## BRIEF FOR RESPONDENT

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### OPINION BELOW

The opinion and order of the United States Court of Claims (A. 12-40) are reported in 182 Ct.Cl. 631, 390 F.2d 894.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the petitioner's Brief.

### QUESTION PRESENTED

The question presented in petitioner's Brief (Br. 2) is: Whether the Declaratory Judgment Act, 28 U.S.C. § 2201,

grants the Court of Claims jurisdiction to enter declaratory judgments against the United States.

The matter which the decision of the Court of Claims resolved was that the Declaratory Judgment Act is applicable to the Court of Claims, and specifically, to respondent's case. Therefore, it is respondent's view that the question before the Court is:

> Whether the Declaratory Judgment Act, 28 U.S.C. § 2201, applies to the United States Court of Claims.

## STATUTES INVOLVED

28 U.S.C. § 451 (Definitions) (Act of June 25, 1948, Ch. 646, 62 Stat. 869, 907) provides, in pertinent part:

> § 451. Definitions
>
> As used in this title:
>
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the Judges of which are entitled to hold office during good behavior.
>
> * * * *

The Tucker Act, 28 U.S.C. § 1491, provides in pertinent part:

> § 1491. Claims against United States generally * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * *

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides in pertinent part:

> § 2201. Creation of remedy.
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * * * *

## STATEMENT

The undisputed facts which the respondent deems to be pertinent to the question of the applicability of the Declaratory Judgment Act to the United States Court of Claim as shown by the petition (A. 3-7) and answer (A. 7-8) filed in the United States Court of Claims, are as follows:

(1) On May 14, 1959 an Army Physical Evaluation Board found respondent unfit for active duty by reason of physical disability.[1] The Physical Evaluation Board recommended his placement on the Temporary Disability Retired List[2] and reevaluation as provided by law (Para. 4, A. 4-5). On June 18, 1959 the Army Physical Review Council reviewed the Physical Evaluation Board action and found respondent fit for duty, i.e. not disabled (A. 4, Para. 5). On July 7, 1959 respondent rebutted the Physical Review Council findings (A. 4, Para. 6). On July 21, 1959 the Army Physical Disability

[1] The Physical Evaluation Board was convened under the provisions of 10 U.S.C. § 1201 *et seq.* and implementing Army regulations, i.e. Army Regulations 635-40A, dated August 13, 1957 and Army Regulations 635-40B, dated August 13, 1957.

[2] See: 10 U.S.C. § 1202.

Appeal Board concurred with the Physical Review Council and, as a result, respondent was retired for longevity on July 31, 1959 (A. 4, Para. 7) under the provisions of 10 U.S.C. § 3911, § 3991 rather than for physical disability under 10 U.S.C. § 1201 *et seq.*

(2) On August 25, 1959 respondent filed an application for correction of military records with the Army Board for Correction of Military Records requesting his records be corrected to show him retired by reason of physical disability (A. 4, 7, Para. 8).[3] The Army Board for Correction of Military Records held a hearing on January 25, 1961 (A. 5, Para. 14). Thereafter, the application was formally denied by the Under Secretary of the Army on May 19, 1961 (A. 6, Para. 16).

Having accrued over thirty years of service for pay purposes, the gross amount of respondent's longevity retirement pay is equal to 75% of the monthly basic pay of a Colonel. Were plaintiff retired by reason of physical disability (either pursuant to the disability evaluation proceedings conducted prior to retirement or pursuant to a retroactive correction of his records[4]) the maximum dis-

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[3] The application was filed under the provisions of 10 U.S.C. § 1552 and Army Regulations 15-185, dated July 18, 1955, the Army's implementing regulation.

[4] Had the application under 10 U.S.C. § 1552 been granted respondent's records would have been retroactively corrected to show his retirement by reason of physical disability on July 31, 1959, which was the recommendation of the dissenting voting member of the Army Board for Correction of Military Records (A. 11). If respondent's records had been corrected to show his retirement by reason of physical disability on July 31, 1959, by virtue of such a retroactive correction of his records 10 U.S.C. § 1552(c) provided authority for the Army's payment "from applicable current appropriations" of all physical disability retired pay due from July 31, 1959 as a result of the correction, the amount of which, coincidentally, would have equaled the amount of taxes withheld from his longevity retired pay. In *Darby* v. *United States*, 146 Ct.Cl. 211, 173 F. Supp. 619 (1959), where an officer's records were corrected under 10 U.S.C. § 1552 to show his promotions to higher ranks at

ability retirement pay rate (i.e. 75%) would have been, and would be, the same as that for longevity. The action of the Secretary of the Army (acting by and through the Physical Evaluation Board, Army Physical Review Council and Army Physical Disability Appeal Board prior to July 31, 1959, and the Under Secretary and Army Board for Correction of Military Records subsequent to July 31, 1959) denied respondent that portion of his retired pay which if retired for physical disability is automatically exempt from income taxation under 26 U.S.C. § 104(a)(4) (A. 13).

The respondent brought this action in the United States Court of Claims, alleging, in pertinent part, that the action of the Secretary of the Army in failing to grant respondent physical disability retirement pay was arbitrary, capricious, not supported by the evidence and contrary to law and regulation and that the failure of the Secretary, acting through the Army Board for Correction of Military Records, to grant respondent disability retirement was arbitrary, capricious, and contrary to the evidence and law. In his petition respondent prayed for a judgment against petitioner "for physical disability retirement with retired pay equal to 75% of the pay of a Colonel * * * less such net retirement pay for years of service heretofore paid to [respondent]", the amount to be determined under Rule 47(c) and for such other and further relief as might be deemed just and proper". (A. 6-7).

The petitioner's first affirmative defense was that respondent's claim was "basically a claim for a refund of taxes" and, therefore, barred by the respondent's failure to allege the filing of a timely claim for refund with the Internal Revenue Service under 26 U.S.C. § 7422(a) (A.

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earlier dates (by adjustments in his dates of rank), it was held that plaintiff was entitled to pay and allowances from the dates of his corrected dates of rank and that 10 U.S.C. § 1552 permitted the Department of the Army to pay plaintiff in accordance with his corrected records (146 Ct.Cl. at 217).

6-7). In acting on the petitioner's motion to dismiss, the Court of Claims issued an order (A. 12) upholding, in effect, the Government's first affirmative defense and suggested that the sole relief which the respondent could then possibly have from the court would be a declaration of his right to be retired for physical disability and to have his records changed accordingly. Because of the history of the point in the Court of Claims (Part I, decision below, A. 14-21) and on account of the petitioner's explicit challenge (in its motion to dismiss) to the Court of Claims' authority to give declaratory relief, the Court of Claims invited reconsideration (A. 14) of the applicability of the Declaratory Judgment Act to "this court and this case" (A. 12). Briefs were filed and the point argued. Thereafter, the Court of Claims rendered its opinion of February 16, 1968 (A. 12-40). In its opinion the Court of Claims accepted the respondent's contention (A. 39) that this was not an action "with respect to federal taxes"; that the "determination which the [respondent] requests is not a determination of his tax liability"; that the interpretation and application of 26 U.S.C. § 104(a)(4) is "totally irrelevant to the questions [respondent] seeks to place before [the Court of Claims]" noting (A. 40 n.42) there was "no question that § 104(a)(4) of the Internal Revenue Code would exempt his retirement pay for income tax if he were held retired for disability"; that "the only questions he presents, or need present, relate to [the respondent's] retirement from the Army"; and that "[i]n the circumstances, [the respondent's] tax motives have absolutely no bearing on the application of the declaratory remedy" (A. 40).

The Court of Claims held that the Declaratory Judgment Act does apply to the Court of Claims and to this case (A. 39). In rendering its decision the Court of Claims overruled its decision in *Twin Cities Properties, Inc.* v. *United States*, 81 Ct.Cl. 655 (1935) (A. 38) wherein it was held that the Declaratory Judgment Act (48 Stat. 955, 1934) did not apply to the Court of Claims.

In determining that the Declaratory Judgment Act applied to the Court of Claims, the Court stated, in pertinent part:

> "All we hold today is that claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast, money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. That use of the Declaratory Judgment Act will surely not extend our jurisdiction or contravene 28 U.S.C. § 1491, *supra*. Whether there are other classes (i.e., non-money-related cases) in which a declaratory proceeding can validly be offered by this court we leave open for further development. At the least, plaintiff's category falls this side of the jurisdictional boundary." (A. 32).

The Court of Claims denied the petitioner's motion to dismiss and granted the respondent leave to amend his petition (A. 40) "to seek explicitly a declaration of his right to be retired for disability and to have his military records changed". The case was "then to be returned to the trial commissioner for further proceedings". The petition was amended March 8, 1968 (A. 41-42). The petitioner filed a motion for reconsideration on March 15, 1968 and an answer to the amended petition on March 29, 1968 (A. 43). The motion for reconsideration was denied without opinion on June 14, 1968. The petitioner then filed its petition.

## SUMMARY OF ARGUMENT

### I.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in a case of actual controversy within its jurisdiction, except with respect to federal taxes, "any court

of the United States" may declare the rights and other legal relations of any interested party seeking such a declaration whether or not further relief is or could be sought. By definition as set forth in 28 U.S.C. § 451, the United States Court of Claims is a "court of the United States". As such, it is clear that the Declaratory Judgment Act is applicable to proceedings within the subject matter jurisdiction of the Court of Claims as set forth in 28 U.S.C. § 1491 such as in the respondent's case which is a claim for disability retired pay involving both Acts of Congress (i.e. 10 U.S.C. § 1201, et seq. and 10 U.S.C. § 1552) and regulations of an executive department (i.e. Army Regulations 635-40A and 635-40B). The Declaratory Judgment Act contains no prohibition or exception to its applicability to proceedings otherwise within the jurisdiction of the United States Court of Claims. There appears to be nothing in the legislative history of the Declaratory Judgment Act to show an intent to exclude the Court of Claims, as a "court of the United States", from being authorized to utilize declaratory procedures provided for in the Declaratory Judgment Act. In this regard, the legislative history indicates that the decisions of the Court of Claims have been viewed as being essentially declaratory in nature since they provide for no execution. The petitioner itself has acknowledged that: "[The Court of Claims] may declare whether a claimant has a right to collect money from the United States," "[b]ut may do no more —it may not even execute on it" (Br. 16). Moreover, the petitioner itself has instituted proceedings for declaratory relief under the provisions of 28 U.S.C. § 2201.

## II.

Since the operation of the Declaratory Judgment Act is procedural only, the waiver of sovereign immunity of the United States under the Tucker Act, 28 U.S.C. § 1491, permits application of the Declaratory Judgment Act to proceedings in the United States Court of Claims that fall within the subject matter jurisdiction of the Court of

Claims. Use of the Declaratory Judgment Act does not enlarge the subject matter jurisdiction of the Court of Claims. So long as the subject matter of the litigation falls within the purview of the Tucker Act the Court of Claims is authorized to employ the procedures provided for in the Declaratory Judgment Act.

III.

There is nothing contained in the provisions of the Tucker Act limiting the Court of Claims to claims for the "present" recovery of money from the United States. To maintain a suit in the Court of Claims there must be a "claim" which must be "against the United States" founded, in pertinent part, upon either the Constitution, an Act of Congress, or any regulation of an executive department but it need not entail a claim wherein the claimant immediately seeks a money judgment or one that is solely for money due and owing at the time the claim is made. The power of the Court of Claims to avail itself of the procedural remedies provided for in the Declaratory Judgment Act does not terminate with a determination by that forum that there is no present right to money being immediately recovered from the United States. Petitioner has presented no authority which supports its contention that the Court of Claims "must" dismiss a case once it finds that a claimant does not have a "present" right to receive money from the United States.

IV.

The decision below is consistent with the historical functions and limitations upon the jurisdiction of the Court of Claims. Petitioner itself has acknowledged that the Congress, in adopting the Declaratory Judgment Act, drew an analogy to the procedures of the Court of Claims, stating that the decisions of the Court of Claims are essentially declaratory in nature. The use of declaratory procedures by the Court of Claims is nothing more than a

procedural step towards determining whether monies are due or will be due a claimant from the United States. As in this case, in order for the Court of Claims to determine whether respondent does have a meritorious claim, i.e. a right to collect money from the United States, it is incumbent upon the court to determine and to "declare" whether respondent should have been retired by reason of physical disability and, secondly, whether his records should have been corrected to show that he was retired by reason of physical disability in 1959. Entry of a declaratory judgment on these issues in relation to respondent's claim would not be inconsistent with the court's functions or limitations on its jurisdiction. To the contrary, it would be compatible with its practice under its Rule 47(c).

The decision below does not connote an assertion of power on the part of the Court of Claims to grant specific equitable relief. The granting of declaratory relief, such as might be accorded respondent in connection with his claim for disability retired pay, is merely a statement of rights or a recognition of the claimant's rights. A declaratory judgment should have the same *res judicata* effect as between the respondent and the United States, just as much as a money judgment. A declaratory judgment would not have the same effect as a mandatory injunction as petitioner contends. The granting of declaratory relief will not constitute a remand, as claimed by petitioner. Any administrative corrective action or relief sought at the administrative level subsequent to the rendering of a declaratory judgment, as in the case of a money judgment, would have to be initiated by a claimant, and not by the agency concerned acting *sua sponte*. As shown by the decision below, and earlier litigation in the Court of Claims, the Court of Claims is keenly aware of the exception in the Declaratory Judgment Act of cases "with respect to Federal taxes" as being a category of cases expressly excluded from the Declaratory Judgment Act. The decision of the Court of Claims clearly shows that the subject matter of respondent's case falls within the subject matter jurisdic-

tion of the Court of Claims defined in the Tucker Act and that it would be appropriate for the Court of Claims to grant respondent declaratory relief.

V.

The decision below is consistent with the purposes of the Declaratory Judgment Act. As a "court of the United States" it is consistent with the express purpose of the Declaratory Judgment Act for the Court of Claims "to declare the rights and other legal relations" of both claimants and the United States in cases of "actual controversy" within its jurisdiction. The authority of the Court of Claims to declare the rights of a claimant and/or the United States with respect to an asserted "claim against the United States" within its jurisdiction, whether or not in the ultimate it is determined that a claimant may or may not be entitled to any monies due in relation to the asserted claim, is manifestly in accord with the intent of the Declaratory Judgment Act.

Petitioner's view that the Declaratory Judgment Act was intended solely to settle "private" controversies is founded on a comment made in the legislative history of the 1935 amendment regarding the exception "with respect to Federal taxes" and not in connection with the enactment of the Declaratory Judgment Act of 1934. Declaratory relief has been deemed proper in areas of Government litigation under federal statutes comparable to the Tucker Act.

The petitioner's view that declaratory relief is not intended to settle "public" controversies is inconsistent with its own actions wherein it has instituted proceedings seeking declaratory relief. Contrary to petitioner's assertion, respondent's claim is not against government officials or federal officials. While the adjudication of a claim against the United States by the Court of Claims necessitates judicial inquiry into the actions of cognizant Government officials against the background of governing laws and regulations, the money relief that may be accorded a

claimant, such as respondent, is obtainable not from the Government officials but solely from the United States.

As a "court of the United States", which the Court has viewed as having "greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental actions" (*Glidden Co.* v. *Zdanok*, 370 U.S. 530, 556-557 (1962)), the granting of declaratory relief by the Court of Claims within the jurisdictional bounds of 28 U.S.C. § 1491 is compatible and consistent with the purposes of the Declaratory Judgment Act.

For these reasons, it is submitted that the Court should affirm the decision below.

## ARGUMENT

### I.

### The Declaratory Judgment Act Is Applicable To The United States Court Of Claims

The Declaratory Judgment Act as enacted in 1934 (48 Stat. 955) authorized "the Courts of the United States" to grant declaratory relief. In 1935 the Declaratory Judgment Act was amended to provide an exception for controversies "with respect to Federal taxes". (49 Stat. 1014, 1027). Since the time of the revision and codification of the Judicial Code in 1948 the Declaratory Judgment Act, 28 U.S.C. § 2201, provides that "*any* court of the United States", in an actual controversy within its jurisdiction, except with respect to Federal taxes, may declare the rights and legal relations of any interested party seeking such a declaration whether or not further relief is or could be sought (emphasis supplied). By definition as set forth in 28 U.S.C. § 451 (1948), the United States Court of Claims is a "court of the United States" [5].

By reason of the very clear language of 28 U.S.C. § 2201 and 28 U.S.C. § 451, it is clear that the Declara-

[5] In a similar vein, within the definitions contained in 28 U.S.C. § 451 the term "judge of the United States" includes "judges . . . of the Court of Claims."

tory Judgment Act is applicable to proceedings within the subject matter jurisdiction of the United States Court of Claims as stated in that forum's general jurisdictional statute, now 28 U.S.C. § 1491 (1964), such as claims against the United States founded upon the Constitution, an Act of Congress, or any regulation of an executive department. In this regard, it is particularly noteworthy that in its brief the petitioner did not cite or make reference to the provision of 28 U.S.C. § 451. Neither has the petitioner addressed itself to, or reconciled, the interrelationship of 28 U.S.C. § 451 and 28 U.S.C. § 2201 and, specifically, as they pertain to the resolution of the question of the applicability of the Declaratory Judgment Act to the United States Court of Claims.

A consideration which lends support to the position that the Declaratory Judgment Act is applicable to the Court of Claims is the fact that the provisions of the Declaratory Judgment Act contain no prohibition or exception, express or implied, as to its applicability to proceedings otherwise within the subject matter jurisdiction of the United States Court of Claims. Additionally, there appears to be nothing in the legislative history of the Declaratory Judgment Act, which was comprehensively reviewed in the decision below (A. 34-38), to show a legislative intent by the Congress to exclude the Court of Claims as a "court of the United States" from being authorized to utilize declaratory procedures provided for in the Declaratory Judgment Act. In this regard, the legislative history indicates that the decisions of the Court of Claims have been viewed as being essentially declaratory in nature since they provide for no execution.[6] These views are entirely in consonance

[6] Support for the view that the Declaratory Judgment Act, even as originally enacted in 1934, has always applied to the Court of Claims is revealed in the passage of the treatise of Professor Edwin Borchard [described by the court below as the "chief extra-Congressional sponsor of the federal act" (A. 37)] on declaratory judgments which stated: "The introduction of the federal Declaratory Judgment Act has raised the question whether the position of the United States Government as a defendant has been modified and whether

with those of the Court as expressed in 1933, a year prior to the enactment of the initial Declaratory Judgment Act, in *Nashville C. & St.L. Ry.* v. *Wallace*, 288 U.S. 249, 263-264 (1933) wherein the Court stated: "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function", and cited among others, the Court's review of judgments of the Court of Claims "although no process issues against the United States". (288 U.S. at 264). Consequently, the language of the 1948 Code revision providing that "any court of the United States" may grant declaratory relief, if not the langauge of the 1934 Act (i.e. "the courts of the United States"), should be deemed to specifically and automatically include the United States Court of Claims. The petitioner itself has acknowledged that: "[The Court of Claims] may declare whether a claimant has the right to collect money from the United States". (Br. 16).

A further and most significant indication of the applicability of the Declaratory Judgment Act to the United States Court of Claims is shown by the unalterable fact that the United States itself has instituted proceedings

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declaratory judgments could not be obtained against the United States under circumstances outside the terms of the Tucker Act and other statutory authority accepting liability and subjection to suit. The answer is clearly in the negative. Since all judgments against the United States within the permitted limits, are declaratory in effect, a petition would doubtless not be dismissed if it sought a declaratory judgment in such cases.". *Borchard, Declaratory Judgments*, Page 373, (2nd Ed., 1941). Similarly, in the final Senate Report on the 1934 Act it was stated, in pertinent part, that: "The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution.". Senate Report No. 1005, 73d Congress, 2nd Session, 4-5 (1934). In this regard, the petitioner stated: "To be sure, in adopting the Declaratory Judgment Act, the Congress drew an analogy to the Court of Claims' procedure, stating that the 'decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution'." (Br. 11).

under the Declaratory Judgment Act, 28 U.S.C. § 2201. As recently as September 27, 1968 the petitioner here, in the case of *United States* v. *Reynolds Metals Company* (Civil Action No. 2412-68), filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment under the provisions of the Declaratory Judgment Act (28 U.S.C. § 2201) in litigation involving a claim of $7,898,479.00.[7] In *Teplitsky* v. *Bureau of Compensation U. S. Department of Labor and United States of America* (USDC, SD, NY, 288 F.Supp. 310, decided March 29, 1968; modified and, as modified,[8] affirmed 398 F.2d 820 (C.A. 2), decided June 21, 1968) declaratory relief was obtained by the petitioner under the provisions of 28 U.S.C. § 2201. In *Raydist Navigation Corp.* v. *United States*, 144 F.Supp. 503 (E.D. Va., 1956) it was held that a court having Tucker Act jurisdiction in an action against the Government may grant a declaratory judgment. Similarly, declaratory relief has also been held proper in comparable Government litigation under: (a) the Suits in Admiralty Act (46 U.S.C. § 741 et seq.)[9]; (b) the National Service Life Insurance Act (38 U.S.C. § 801 et seq.)[10]; (c) the Trading With The Enemy Act (50 U.S.C. App. § 1 et seq.)[11]; and (d) the Federal Tort

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[7] By praecipe filed October 25, 1968 the action was dismissed without prejudice in view of the institution of litigation "on the same claim" by Reynolds Metals Company in the United States Court of Claims.

[8] The modification related to the election of compensation benefits available to the appellant.

[9] *Luckenbach Steamship Co.* v. *United States*, 312 F.2d 545 (C.A. 2, 1963); *American-Foreign Steamship Corp.* v. *United States*, 291 F.2d 598, 604 (C.A. 2), cert. denied, 368 U.S. 895 (1961); *American President Lines* v. *United States*, 162 F.Supp. 732, 739 (D.Del, 1958), affirmed per curiam; 265 F.2d 552 (C.A.3, 1959).

[10] *Unger* v. *United States*, 79 F.Supp. 281, 283-284 (E.D. Ill., 1948)

[11] *Brownell* v. *Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (C.A.9, 1954)

Claims Act (28 U.S.C. § 1346(b))[12]. The petitioner did not cite or make reference to the cases falling within the aforementioned categories of litigation. With respect to the respondent's case, the Court of Claims held, for the reasons stated in Part IV of the decision below (A. 29-34, at A. 31), respondent's case "fits snugly into the traditional class of money claims against the Federal Government" (A. 39).

In the light of the foregoing points and authorities, it is urged that the Declaratory Judgment Act, 28 U.S.C. § 2201, is applicable to the United States Court of Claims.

## II.

### The Declaratory Judgment Act Is A Procedural Remedy And Does Not Involve Expansion Of Subject Matter Jurisdiction Of The United States Court Of Claims

It is well established that the "operation of the Declaratory Judgment Act is procedural only". *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). As the Court stated in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299 (1943): "The statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies both at law and in equity, which the Judiciary Act has already conferred.". In *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-672 (1950), the Court presented a definitive interpretation of what the Congress had done in enacting the Declaratory Judgment Act when it held that:

> "Congress enlarged the range of remedies available in the federal courts but did not extend their juris-

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[12] *Pennsylvania R.R. Co.* v. *United States*, 111 F.Supp. 80, 85-90 (D. N.J., 1953) wherein it was held that a declaratory judgment was available, even where no money damages are immediately claimed, at least as a "procedural step" toward obtaining damages.

> diction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, 'jurisdiction' means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act." (339 U.S. at 671-672).

Since the operation of the Declaratory Judgment Act is procedural only, the waiver of sovereign immunity of the United States under the Tucker Act, 28 U.S.C. § 1491, clearly permits the application of the Declaratory Judgment Act to proceedings in the United States Court of Claims that fall within the subject matter jurisdiction of that forum. Utilization of the declaratory procedures or remedies provided for in the Declaratory Judgment Act does not enlarge or expand the subject matter jurisdiction of the Court of Claims. So long as the subject matter of the litigation falls within the purview of the Tucker Act the Court of Claims is authorized to employ the procedures provided for in the Declaratory Judgment Act.

At the outset of its argument petitioner has stated that the "resolution of this case requires analysis of the Declaratory Judgment Act and the Tucker Act, which are the only possible sources of the waiver of sovereign immunity that is necessary to sustain the instant decision of the Court of Claims" (Br. 7). In consonance with the existing precedents, petitioner has acknowledged (Br. 8) that the operation of the Declaratory Judgment Act is procedural only. Specifically, petitioner has stated that the Declaratory Judgment Act "makes available a new procedure, but that procedure is limited to cases that come within the jurisdictional limits established by other provisions of the Judicial Code" (Br. 9). Petitioner cites the Tucker Act (28 U.S.C. § 1346(a), § 1491) as an example of how the Congress "has always cast waivers of sovereign immunity in explicit and unmistakable terms" (Br. 7).

Despite the foregoing acknowledgements by the petitioner, the petitioner argues (Br. 8) that the Declaratory Judgment Act does not contain an "explicit waiver of sovereign immunity" making the provisions of the Declaratory Judgment Act applicable to the Court of Claims. In essence, the petitioner asserts that utilization of the declaratory procedures provided for in the Declaratory Judgment Act would be expanding the jurisdiction of the Court. It appears that the position taken by petitioner is wholly inconsistent with its own recitals especially in view of its acknowledgment that the Declaratory Judgment Act *is applicable* to cases "within the jurisdictional limits established by *other provisions of the Judicial Code*"—here the provisions of 28 U.S.C. § 1491 (Emphasis supplied). The apparent inconsistency of petitioner is also revealed by its own statement that: "[The Court of Claims] *may declare* whether a claimant has the right to collect money from the United States" (Br. 16) (Emphasis supplied). Obviously, any declaration would have to be founded upon the "kinds of issues which give right of entrance" to the Court of Claims such as those set forth in the general jurisdictional statute of the Court of Claims, now 28 U.S.C. § 1491 (1964).

It is most significant that in connection with its entire argument (Br. 8-9) in relation to the necessity for an analysis of the Declaratory Judgment Act and the Tucker Act as the "only possible sources of the waiver of sovereign immunity that is necessary to sustain the instant decision of the Court of Claims", the petitioner did not cite or discuss the waiver of sovereign immunity contained in 28 U.S.C. § 1491 as such provides, in petitioner's own words, the "other provisions of the Judicial Code" which makes the Declaratory Judgment Act applicable to the United States Court of Claims. Nowhere within the bounds of its argument did the petitioner address itself to the provisions of 28 U.S.C. § 1491 as the link to the application of the Declaratory Judgment Act to proceedings in the United States Court of Claims. Equally significant, with-

in the bounds of its argument (Br. 8-9) the petitioner did not discuss or reconcile the matter of the Declaratory Judgment Act being applicable to "any court of the United States" especially in the light of the fact that the United States Court of Claims is expressly included within the definition of "courts of the United States" as stated in 28 U.S.C. § 451 (1948).

The Declaratory Judgment Act, as shown above, is a procedural remedy that is available to "any court of the United States". Employment of the declaratory procedures provided for in the Declaratory Judgment Act does not involve an expansion of the subject matter jurisdiction of the Court of Claims. Therefore, it is clear that the provisions of the Declaratory Judgment Act are available to the United States Court of Claims to the extent that its procedures are applied "[i]n a case of actual controversy within its jurisdiction", namely, to the extent there has been a waiver of sovereign immunity as granted under the Tucker Act.

## III.

### The Court Of Claims Is Not Limited To Application Of The Declaratory Judgment Act Solely To Suits Involving Claims For The Present Recovery Of Money From The United States

The jurisdiction of the United States Court of Claims to adjudicate claims against the United States generally is founded on the part of the Tucker Act now codified in 28 U.S.C. § 1491 (1964) which provides, in pertinent part, as follows:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The petitioner contends (Br. 9-16) the jurisdiction of the Court of Claims as provided for in the Tucker Act, 28 U.S.C. § 1491, is limited solely to the adjudication of claims for the "present" recovery of money from the United States; that the Court of Claims "must" dismiss a case once it finds the claimant does not have a "present right to receive money from the United States"; that a "declaration" by the Court of Claims relates solely to a "present right to payment from the United States"; and that "[b]ecause the Court of Claims' jurisdiction ends if it determines that there is no present right to money, its power to declare rights ends at the same point". The petitioner has presented no precedents or authority which support its contentions or "analysis".

There is nothing in the language of the Tucker Act which justifies it being construed or qualified in the manner suggested by the petitioner. The Tucker Act does not state that "any claim" brought under the provisions of that statute shall be solely for the "present" recovery of money. There is nothing in the language of the Tucker Act which states that "any claim" against the United States may only be for money owing at the time the claim is made. Similarly, the language of 28 U.S.C. § 1491 does not dictate that the Court of Claims "must" dismiss a suit once it determines the claimant does not have a "present right to receive money from the United States" or that its "declaration" will relate solely to a "present right to payment from the United States". Additionally, the authority of the Court of Claims to declare the rights of claimants is not at an end if it determines that there is "no present right to money".

The question of whether or not a claim against the United States is limited to the recovery of money presently due was accorded exhaustive consideration in the decision below (A. 30-31) in connection with the court's recital of the specific prerequisites for the "kinds of issues which give right of entrance" to the Court of Claims within the

framework of 28 U.S.C. § 1491. Specifically, the Court stated in pertinent part:

> "Historically . . . the area with which we have dealt has been that of controversies with a money cast—cases tied in some way to a demand or call upon the Government for the payment of money to the claimant, either because his money (or property) was wrongfully taken by (or handed over to) the United States or because the United States owes or will owe him money on account of some contract or provision of law. See *Eastport S.S. Corp.* v. *United States*, 178 Ct.Cl. 599, 605-07, 372 F.2d 1002, 1007-09 (1967); *cf Ralston Steel Corp.* v. *United States*, 169 Ct.Cl. 119, 125, 340 F.2d 663, 667, *cert. denied*, 381 U.S. 950 (1965); *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 167 Ct.Cl. 236, 244-45, 334 F.2d 622, 626-27 (1964), *cert. denied*, 379 U.S. 964 (1965). But for a suit to have *such a money cast does not require* (as we have pointed out)[13] *that the plaintiff immediately seek a money judgment from this court or even that he ever seek such a judgment. What it does mean is that the claimant, if he does*

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[13] With respect to the question of the Court's practice under Court of Claims Rule 47(c) the Court of Claims stated: "Moreover, pursuant to Court of Claims Rule 47(c) 'a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the amount of recovery, *if any*, for further proceedings' and 'the judgment on the question of the right to recover shall be final.' [Emphasis in original]. In a great number of cases utilizing Rule 47(c) we have, in effect, declared the liability of the defendant before it was determined whether there would be any money award at all" (Citing *Shaw* v. *United States*, 174 Ct.Cl. 899, 357 F.2d 949 (1966)). "Like a formal declaratory judgment, a decree of liability entered under the rule is a mere statement of rights, though it too may be (but not surely) the basis for the recovery, *in the future*, of money." (Emphasis supplied). In this regard, the court went on to state: "In some instances, we have declared the claimant entitled, although in the very same opinion we have concluded that he could not recover any money; a recent example is *Everett* v. *United States*, 169 Ct.Cl. 11, 340 F.2d 352 (1965), where a federal employee who was held illegally discharged was at the same time barred from a money judgment because he could not prove that he was able to work during the period of his wrongful removal." (A. 27-28).

> *not ask for a money judgment, pray for this court's help in order to be in a position to collect money from the United States, sometime in the future.* Such an action has a money cast and is money-oriented—can, in other words, properly be called a 'money claim' or at least a 'money-related claim' against the Federal Government—in the realistic sense that the plaintiff's declaratory judgment, if he prevails, *will lead to his being able to receive money* from the Government, if he chooses, perhaps immediately after the judgment or perhaps at some future time. *The claim for money may not be current or immediate* but it is *at least potential*, and the action is therefore linked to the recovery of money from the Government." (A. 30) (Emphasis supplied)

From the foregoing it can readily be seen that both as a matter of traditional practice, and as a practical matter, the Court of Claims is not limited to the adjudication of claims against the United States involving solely a claim for the "present" recovery of money, nor "must" it dismiss a claim if it finds the claimant does not have a "present right to receive money from the United States", as asserted by the petitioner. The same would hold true in the application of the provisions of the Declaratory Judgment Act by the Court of Claims to proceedings falling within the confines of 28 U.S.C. § 1491.

In an attempt to find support for its "analysis" or argument that the jurisdiction of the Court of Claims is limited to claims for the "present" recovery of money from the United States petitioner cites *Glidden Co.* v. *Zdanok*, *supra* 370 U.S. at 557, quoting therefrom as follows: "From the beginning it has been given jurisdiction only to award damages * * *" (Br. 10). The full sentence cited from *Glidden* v. *Zdanok* stated: "From the beginning it has been given jurisdiction only to award damages, *not specific relief.*" (Emphasis supplied). (Citing *United States* v. *Alire*, 73 U.S. (6 Wall.) 573 (1867) and *United States* v. *Jones*, 131 U.S. 1 (1889).) Both *United States*

v. *Alire*, *supra* and *United States* v. *Jones*, *supra* dealt with prayers for specific equitable relief relating to public lands.[14] In *Glidden Co.* v. *Zdanok* the Court was addressing itself to the "money judgment" doctrine as distinguished from actions for specific, coercive relief which, as originally decided in *United States* v. *Alire*, *supra*, and followed in *United States* v. *Jones*, *supra*, were deemed to go beyond the jurisdiction of the Court of Claims. In *Glidden Co.* v. *Zdanok* the Court did not hold that the jurisdiction of the Court of Claims was limited to cases solely involving a claim for the "present" recovery of money. Equally significant, in *Glidden Co.* v. *Zdanok* the Court did not address itself to the question of the applicability of the Declaratory Judgment Act, 28 U.S.C. § 2201, to the United States Court of Claims.

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[14] The judgment entered by the Court of Claims (and reversed by the Court) in *United States* v. *Alire* pertained to the claimant recovering from the government a military land warrant to be made out and delivered to the plaintiff "by the proper officer, and the decree to be certified and remitted to the Secretary of the Interior" (73 U.S. (6 Wall.) at 576). In *United States* v. *Alire* the Court stated (73 U.S. (6 Wall.) at 573) that under the 1855 and 1863 Acts establishing the Court of Claims (Act of February 24, 1855, Ch. 122, 10 Stat. 612; Act of March 3, 1863, Ch. 92, 12 Stat. 765) "the only judgments which the Court of Claims [was] authorized to render against the Government * * * [were] judgments for money found due from the government to the petitioner." (73 U.S. (6 Wall.) at 575) and that "although it was true that the subject matter over which jurisdiction is conferred, both in the acts of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." (73 U.S. (6 Wall.) at 575-576). In *United States* v. *Jones*, *supra*, the plaintiffs sought, under the Tucker Act provision granting concurrent jurisdiction to the district courts and then circuit courts, "equitable relief by specific performance, to compel the issue and delivery of a [timber] patent". 131 U.S. at 14. In *United States* v. *Jones* the Court held that the passage of the Tucker Act in 1887, Ch. 359, § 1, 24 Stat. 505, (March 3, 1887) had not enlarged the bounds defined in *United States* v. *Alire*. Neither *Alire* or *Jones* embraced requests for declaratory judgments.

To supplement its "money judgment" argument in relation to the contention that the jurisdiction of the Court of Claims is limited to cases involving claims for the "present" recovery of money, petitioner points to other cases (Br. 10) which held that the Court of Claims may not issue mandamus [15], may not determine an equitable claim for money [16], may not remand a case to an administrative agency [17], may not direct specific performance [18] and may not even grant nominal damages [19], citing also *United States* v. *Sherwood*, 312 U.S. 584 (1941). All of these cases, with the exception of *United States* v. *Jones, Receiver*, 336 U.S. 641, were decided before the 1948 Judicial Code revision which provided that the Declaratory Judgment Act is applicable to "any court of the United States" and included the United States Court of Claims within the term of a "court of the United States" (28 U.S.C. § 451). 5 of the 9 cases cited by the petitioner were decided before the enactment of the Declaratory Judgment Act in 1934. In *United States v. Jones, Receiver, supra*, decided April 18, 1949, while referring to the "money judgment" jurisdiction of the Court of Claims in comparison to district courts, and in noting the provision for judicial review under the Administrative Procedure Act (§ 10, 60 Stat. 243, June 11, 1946, 5 U.S.C. § 701, et seq.) (including declaratory judgments), the Court did not consider, or speak of, the applicability of the Declaratory Judgment Act to the Court of Claims in the light of the 1948 Code revision providing that the Declaratory Judgment Act is applicable to "any court of the United States" (336 U.S. at 671-672). The issue involved in *United States* v. *Sherwood, supra*, was whether the Tucker

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[15] *United States* v. *Alir supra* (1867).

[16] *Bonner* v. *United States*, 76 U.S. (9 Wall.) 156 (1869).

[17] *United States* v. *Jones, Receiver*, 336 U.S. 641 (1949).

[18] *United States* v. *Jones*, 131 U.S. 1 (1889).

[19] *Grant* v. *United States*, 74 U.S. (7 Wall.) 331, 338 (1868); *Marion & Rye Valley Railway Co.* v. *United States*, 270 U.S. 280 (1926); *Nortz* v. *United States*, 294 U.S. 317, 327 (1935); *Perry* v. *United States*, 294 U.S. 330, 355 (1935).

Act waived sovereign immunity in suits by the creditor of a person having a claim against the United States. As petitioner itself acknowledged (Br. 14), the decision in *United States* v. *Sherwood, supra*, turned on the fact that the creditor did not himself have a claim against the United States—"the jurisdictional requisite of the Tucker Act" (Br. 14). The Court noted that the Court of Claims' "'jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States [citing *United States* v. *Alire, supra*, and *United States* v. *Jones, supra*] and if relief is sought against other than the United States the suit [is] * * * beyond the jurisdiction of the Court." (312 U.S. at 588). Hence, the issue to which the Court was directed was the jurisdiction over parties other than the United States and not to the question of whether the Declaratory Judgment Act is applicable to the United States Court of Claims or whether the jurisdiction of the Court of Claims is limited to the adjudication of claims involving the "present" recovery of money from the United States. Again, it is to be noted, that the decision in *United States* v. *Sherwood* was rendered prior to the 1948 revision and codification of the Judicial Code wherein the Declaratory Judgment Act provides that "any court of the United States" may render a declaratory judgment. Moreover, the decision below is not inconsistent with the rationale of *United States* v. *Sherwood* as petitioner has asserted (Br. 6, 14). The Court did not hold in *United States* v. *Sherwood*, nor in any of the other cases cited by petitioner, that the Court of Claims' jurisdiction is confined to claims involving the "present" recovery of money from the United States.

In furtherance of its argument that the jurisdiction of the Court of Claims is limited to the "present" recovery of money petitioner cites *Twin Cities Properties, Inc.* v. *United States*, 81 Ct.Cl. 655 (1935) (which the decision below overruled (A. 23)) which held that the 1934 Declaratory Judgment Act was not applicable founded on the view, as stated in the decision below, "that allowance of declaratory relief would expand the Tucker Act juris-

diction of the court beyond its accepted limits; that "Congress, if it meant to consent to the expansion would have referred to the court by name in the Declaratory Judgment Act"; and "that, since Congress did not, the court has no warrant to assume declaratory power" (A. 23). At the time of the *Twin Cities Properties, Inc.* v. *United States* decision the Declaratory Judgment Act extended to "the courts of the United States". The decision in *Twin Cities Properties, Inc.* did not cite or discuss any reasons why declaratory relief would have been inappropriate to the Court at that time, disposing of the question in two paragraphs, stating:

> "We think the defendant's motion [to dismiss for lack of jurisdiction] should be sustained. In the case of *Pocono Pines Assembly Hotels Co.* v. *United States*, [73 Ct.Cl. 447, *motion to file petition for writ of mandamus and/or prohibition denied*, 285 U.S. 526 (1932)], we had occasion to discuss *in extenso* the jurisdiction of this court, and in view of the axiomatic legal principle that the United States may not be sued without its consent, we think it exacts a specific statute according such consent and expressly conferring jurisdiction upon this court before we may proceed. *United States* v. *Milliken Imprinting Co.*, [202 U.S. 168 (1906)]; *Eastern Transportation Co.* v. *United States*, [272 U.S. 675 (1927)]; *United States* v. *Michel*, [282 U.S. 656 (1931)].
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> "If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised." [81 Ct.Cl. at 658.] (A. 22).

In the decision below, however, the Court of Claims furnished definitive insight into the basis upon which it deemed the Declaratory Judgment Act, 28 U.S.C. § 2201 (1948) is applicable to the Court of Claims (A. 34). Spe-

cifically, in this regard, the Court stated: "Because the term 'any court of the United States' in the operative clause of the Declaratory Judgment Act strongly suggests the inclusion of the Court of Claims and because we believe that declaratory relief is consistent with the concept of money-judgment jurisdiction established by *Alire* and *Jones*, that it need not be used to expand our jurisdiction, and that it would not result in the exposure of the sovereign to an alien remedy, we do not require, as the court in *Twin Cities* did, a totally unambiguous Congressional statement vesting us with the authority to grant declaratory relief against the United States." (A. 34)[20]. Consideration of the factors cited by the Court of Claims as to the precise basis for its decision holding the Declaratory Judgment Act is applicable to the Court of Claims clearly shows that its holding is completely justified and rests on firm footing and that the overruling of the *Twin Cities Properties, Inc.* decision was well founded.

In furtherance of its contention that the jurisdiction of the Court of Claims is limited to claims involving the "present" recovery of money from the United States, the petitioner has asserted that every court of appeals that has considered the question of whether the combined effect

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[20] In connection with its reference to the *Twin Cities Properties, Inc.* v. *United States* decision, petitioner cited (Br. 12) *Rolls-Royce Ltd. Derby, England* v. *United States*, 176 Ct.Cl. 694, 364 F.2d 415 (1966). A reading of the holding in *Rolls-Royce Ltd., Derby, England* v. *United States* shows that the court did not rule that the Declaratory Judgment Act does not apply to the Court of Claims or that the Court of Claims' jurisdiction is limited to claims involving the "present" recovery of money. The opinion shows (176 Ct.Cl. at 701-702) that the Court of Claims was only concerned with the resolution of a jurisdictional question in connection with a counterclaim between two private parties (i.e. intervenor's counterclaim against plaintiff). There, the Court of Claims held that this portion of the counterclaim went beyond the jurisdiction of the Court since the Court had no jurisdiction over a private party's action for breach of contract against the plaintiff and that it followed that the Court could not circumvent its lack of jurisdiction by granting the private party the relief it sought under the Declaratory Judgment Act.

of the Tucker Act and the Declaratory Judgment Act is to allow the district courts to render declarations of rights against the United States have ruled "that the district court's jurisdiction under the Tucker Act is limited to claims for actual, presently due money damages from the United States and that Congress has not waived immunity to allow declaratory judgments in the absence of such a claim" (Br. 12). In each of the cases cited by petitioner (Br. 12-13) to support its contention the underlying controversy was held to be outside the court's jurisdiction. The actions were to declare wheat quota legislation unconstitutional;[21] to fix for federal tax purposes the allocation of partnership income;[22] to prevent the sale of Government-owned property;[23] to hold the United States for breach by a serviceman of his assignment of retired pay;[24] to compel employment in the Government;[25] to review agency action where the statute precluded, or was thought to preclude, review;[26] to void an assignment of letters patent[27] and to declare the good time allowance of a federal prisoner who had not exhausted his administrative remedies.[28] On the basis that there was no jurisdiction

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[21] *Stout* v. *United States*, 229 F.2d 918 (C.A. 2) (1956), cert. denied, 351 U.S. 982 (1956). Compare with *Teplitsky* v. *Bureau of Compensation U.S. Department of Labor and United States of America, supra*, wherein the Court of Appeals for the 2nd Circuit affirmed, with modification (as to election of compensation benefits available to appellant), a holding of the United States District Court for the Southern District of New York that petitioner here was entitled to bring an action under 28 U.S.C. § 2201 and the petitioner obtained declaratory relief.

[22] *Wilson* v. *Wilson*, 141 F.2d 599 (C.A. 4) (1944).

[23] *Anderson* v. *United States*, 229 F.2d 675 (C.A. 5) (1956).

[24] *United States* v. *Smith*, 393 F.2d 318 (C.A. 5) (1968).

[25] *Love* v. *United States*, 108 F.2d 43 (C.A. 8) (1939), cert. denied 309 U.S. 673 (1940).

[26] *Wells* v. *United States*, 280 F.2d 275 (C.A. 9) (1960).

[27] *Clay* v. *United States*, 210 F.2d 686 (CADC) (1953), cert. denied, 347 U.S. 927 (1954).

[28] *Gibson* v. *United States*, 161 F.2d 973 (C.A. 6) (1947).

over the subject matter neither the respondent nor the Court of Claims would reach a different result in these cases. None of the cases cited by petitioner support the petitioner's argument that the jurisdiction of the Court of Claims is limited to claims involving "presently" due money. Similarly, none of these cases held that the Declaratory Judgment Act does not apply to "any court of the United States" and, specifically, to the Court of Claims.

On the basis of the foregoing points and authorities it is urged that the jurisdiction of the United States Court of Claims is not limited to claims against the United States involving money "presently" due from the United States.

## IV.

### The Decision Below Is Consistent With The Functions Of And Limitations Upon The Jurisdiction Of The Court Of Claims

The decision of the Court of Claims holding that the Declaratory Judgment Act is applicable to that forum is entirely consistent with its historical functions and limitations upon the jurisdiction of the Court of Claims. The petitioner itself has acknowledged (Br. 11) that the Congress in adopting the Declaratory Judgment Act, drew an analogy to the procedures of the Court of Claims, stating that the decisions of the Court of Claims are essentially declaratory in nature (Citing S. Rep. No. 1005, 73d Cong., 2nd Sess. 4-5 (1934)). In consonance with the decision in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, *supra*, the application of the declaratory procedures provided for in the Declaratory Judgment Act merely enlarges the "range of remedies" available in the Court of Claims and will not "extend [its] jurisdiction" beyond the limits of its jurisdiction as set forth in the Tucker Act as now codified in 28 U.S.C. § 1491. As shown in the decision below the Court of Claims was keenly aware that its "use of the Declaratory Judgment Act need not, and will not, be

used to expand the classes of claims or issues which this Court may consider" (A. 29). As the Court of Claims stated". "The [Declaratory Judgment] Act itself states that a court may adopt the procedure only in cases 'within its jurisdiction' ". (A. 29).

Use of declaratory procedures by the Court of Claims merely represents a "procedural step" in the adjudication of a claim against the United States within the purview of 28 U.S.C. § 1491, that is, with respect to any claim against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" in order to determine whether monies are due or will be due a claimant from the United States. As in this case, in order for the Court of Claims to determine whether the respondent does have a meritorious claim, i.e. a right to collect money from the United States, it is incumbent upon the Court of Claims to determine and to "declare" whether the respondent should have been retired by reason of physical disability and secondly, whether his records should have been corrected to show that he was retired by reason of physical disability in 1959. Entry of a declaratory judgment on these issues in relation to the respondent's claim would not be inconsistent with the Court of Claims' functions or limitation on its jurisdiction. To the contrary, it would be compatible with its practice under Court of Claims Rule 47(c).

Examination of the decision below readily shows there is no basis upon which it can be said that the utilization of declaratory procedures by the Court of Claims will cause it to "hear and declare rights in a variety of situations that have always been thought beyond its power", as petitioner has asserted (Br. 16). This is best shown, as indicated above, by the Court of Claims' unequivocal statement that its "use of the Declaratory Judgment Act

need not, and will not, be used to expand the classes of claims or issues which this Court may consider" (A. 29). Other elements of the decision which serve to negate the petitioner's assertion are the Court of Claims' observations that "a declaratory proceeding could not be used for money-related claims which this court cannot consider"; that claimants "with tort claims against the Government or other causes of action over which we have no power, cannot evade the subject-matter limitations of our jurisdiction by refashioning their actions in the terms of a declaratory proceeding"; that "specific relief otherwise unavailable here (injunction, mandamus, specific performance, prohibition, orders *in rem*) cannot be obtained in violation of the *Alire-Jones* doctrine"; and that a claim which "is not in reality against the Government" cannot "be camouflaged as such in the guise of a declaratory proceeding" (A. 32-33). As the Court of Claims stated: "For a money-related claim against the United States, all that can happen under the Declaratory Judgment Act as applied in this court is that the plaintiff's *right*, if it is within our competence, will be *recognized* 'even though no immediate enforcement of it [is] asked' ". (Citing *Skelly Oil Co.* v. *Phillips Petroleum Co.*, *supra*, 339 U.S. at 671). Surely, within this frame of reference, it is self-evident that from the decision below there is no justification for it being asserted, concluded or inferred that the Court of Claims has embarked upon a course that will result in it hearing or declaring rights "in a variety of situations" beyond the jurisdiction of the Tucker Act, 28 U.S.C. § 1491.

Petitioner contends that "[i]n practical effect" the Court of Claims "has here asserted the power to grant relief that is equitable in nature" (Br. 17). To support its contention the petitioner states: "It authorized respondent to seek 'a declaration of his right to be retired for disability and to have his military records changed" (A. 40). Review of the decision below shows that the holding that the provisions of the Declaratory Judgment Act are applicable

to the Court of Claims does not connote an assertion of power on the part of the Court of Claims to grant relief that is equitable in nature. Specifically, the Court of Claims took cognizance of the fact that it is "axiomatic that this court has no direct power to grant specific equitable relief (injunction, mandamus, restraining order and the like) on a claim and cannot have unless Congress grants that power"; that a "declaratory judgment is not a form of specific equitable relief, or strictly speaking, equitable relief"; and that "[a]lthough considerations relevant to the issuance of various forms of equitable relief are also pertinent to the use of the Declaratory Judgment Act" and "the historical origins of declaratory relief are in equity" that "the procedure 'is neither distinctly in law nor in equity, but sui generis' " (Citing S. Rep. No. 1005, 73d Cong., 2nd Sess. 6 (1934)) (A. 25). These observations by the Court of Claims are consistent with the Court's statement in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943) that the Declaratory Judgment Act "only provided a new form of procedure for the adjudication of rights in conformity to [established equitable] principles (319 U.S. at 300). In this regard, it would appear that the petitioner has misconstrued the nature or intent of the declaration which the Court of Claims authorized the respondent to seek. As viewed by the respondent, the declaration authorized by the Court is one in which his rights would be declared on the two issues identified by the Court of Claims which have a direct bearing on his claim for disability retired pay, namely, (a) whether "by the capricious action of the Secretary of the Army, he was retired for longevity rather than physical disability" (in 1959) and (b) whether "his records should have been corrected [in 1961] to indicate retirement for [physical disability in 1959]" (A. 39). Such a declaration would be a "mere statement of rights" similar to that now granted under Court of Claims Rule 47 (c) (A. 27) or *a recognition of respondent's rights* (A. 33) as they pertain to his claim for disability retired pay.

Petitioner asserts that a declaration by the Court of Claims "presumably would have a *res judicata* effect as between respondent and the United States" (Br. 17). As the Court of Claims stated in the decision below, both "money judgments and declaratory judgments are both res judicata in later suits between the parties" (A. 28). As such, it would be expected that declaratory relief granted by the Court of Claims would have, and should have, such an effect. Most certainly, such an effect would not represent anything in excess of the historical functions of the Court of Claims. Similarly, with respect to the petitioner's view that the granting of declaratory relief "could be the same as the entry of a mandatory injunction" (Br. 17-18) it can readily be seen that the impact of a declaratory judgment would be no more than that traditionally flowing from the entry of a money judgment. As in the case of the award of a money judgment, as described in the decision below, the granting of declaratory relief by the Court of Claims would serve as "authoritative information to officials that their conduct was unlawful and that unless their positions are altered similar judgments may be rendered in the future" (A. 26). However, the declaration, as with money judgments, would merely have a "*volitional reaction* of a responsible government in conforming its conduct to the pronouncements of an authoritative tribunal" (A. 26) (Emphasis supplied). With reference to the petitioner's supposition that the effect of the granting of declaratory relief would be a "remand" to the administrative level, it appears that the petitioner has not taken into account that, as in respondent's case, any administrative corrective action or relief sought subsequent to the rendering of a declaratory judgment, as in the case of a money judgment, would have to be initiated by a plaintiff and not by the agency concerned acting *sua sponte*. This is precisely what was envisioned by the Court of Claims when it addressed itself to the respondent's potential use of his declaration to obtain administrative relief (A. 31).

In connection with the petitioner's endeavor to show "[o]ther enlargements upon the Court of Claims' jurisdiction that result from the decision below" it appears that the Court of Claims had authorized two plaintiff's an opportunity to amend their complaints to seek declaratory relief. In one, *Paulsen* v. *United States*, Ct.Cl. No. 327-67, the amended petition seeks credit for alleged involuntary sick leave, or, in the alternative, $636.00 for a specific involuntary leave period. The other case, *Wilkerson* v. *United States*, Ct.Cl. No. 137-65, involved a claim for a widow's benefits as affected by a discharge alleged to be wrongful.[29] The Government in each of the three maritime cases[30] petitioner cited—which involve money claims, and include a prayer for declaratory relief (Br. 19), moved for summary judgment on the ground that the cause of action was non-justiciable. If the Government is right, the suits are not saved by the prayer for declaratory relief.

The decision below, as well as the decision in *Sweeney* v. *United States*, 152 Ct.Cl. 516, 285 F.2d 444 (1961), manifestly demonstrate the Court of Claims' keen and total awareness of the exception provided for in the Declaratory Judgment Act of cases "with respect to Federal taxes" and, accordingly, that there is no foundation for the "concern" expressed by the petitioner in the area of

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[29] In *Wilkerson*, a judgment was entered for plaintiff in the amount of $2,916.00 on October 4, 1968 based on a stipulation filed October 1, 1968 wherein the plaintiff agreed to accept $2,916.00 in full settlement of the claim. Obviously, this was a claim with a "money cast" or was a "money related" claim. The claim for $636.00 in *Paulsen* and the entry of the money judgment in *Wilkerson* surely negates the petitioner's assertion that *Paulsen* and *Wilkerson* "obviously present circumstances where the Court of Claims could not grant a money judgment, and without the asserted power to issue declaratory relief, would have no jurisdiction". (Br. 20).

[30] *American Export Isbrandsten Lines, Inc.* v. *United States*, Ct.Cl. No. 75-68; *American President Lines, Ltd.* v. *United States*, Ct.Cl. No. 55-68; *Delta Steamship Lines, Inc.* v. *United States*, Ct.Cl. No. 74-68.

"federal tax litigation" (Br. 20-21). In the decision below, the Court of Claims identified cases "with respect to Federal taxes" as a "category expressly exempt from the Declaratory Judgment Act" (A. 15). As reflected in the decision below, the attention of the Court was specifically directed to the exception "with respect to Federal taxes" in its rejection of the petitioner's contention that respondent's case fell within the exception and the Court of Claims' holding that the "determination which [respondent] requests is not a determination of his tax liability" (A. 39) and that the interpretation and application" of 26 U.S.C. § 104(a)(4) "(allowing exclusion of allowances for armed-services connected injuries and sicknesses) is totally irrelevant to the question [respondent] seeks to place before us" (A. 39-40).[31] In *Sweeney* v. *United States, supra,* the plaintiff sought, in pertinent part, to recover federal income taxes alleged to have been erroneously asserted and collected from his deceased father. The Court of Claims held that one of the plaintiff's counts related to a claim for refund of taxes paid on retired pay was barred and, in connection therewith, also held further that it had to be dismissed "on the additional ground that this court has no jurisdiction to grant a declaratory judgment with regard to federal taxes under 28 U.S.C. § 2201" (152 Ct.Cl. at 522). As shown by the decision below, the respondent's "tax motives have absolutely no bearing on the application of the declaratory remedy" (A. 40). This is not a "tax refund case". The respondent is seeking disability retired pay. Here, in the language of the Court of Claims in *Oleson* v. *United States*, 172 Ct.Cl. 9 (1965), respondent's "judicial claim" is being made be-

[31] Petitioner has erred in stating that "[r]espondent's retirement pay would be the same regardless of the basis for retirement" (Br. 20). While the "maximum pay rate" (A. 13) or gross amount to which respondent is entitled whether retired for longevity or physical disability is the same (i.e. 75% of his monthly basic pay) there would be an actual difference had he been retired by reason of physical disability (the quantum of which equals the federal taxes withheld on his retired pay for longevity). (A. 12-13).

cause he "was not [and has not been] paid the full amount of [disability] retired pay to which he was [and is] duly entitled [as a matter of right but for the arbitrary and capricious action resulting in his not being retired for physical disability]". (172 Ct.Cl. at 14). As such, it is clear that the subject matter of respondent's case falls within the subject matter jurisdiction of the Court of Claims as defined in the Tucker Act, 28 U.S.C. § 1491, and that it would be appropriate for the Court of Claims to grant the respondent declaratory relief as provided for in the Declaratory Judgment Act.

In the light of the foregoing considerations, it is urged that the decision below is consistent with the historical functions of and limitations upon the jurisdiction of the Court of Claims.

## V.

### The Decision Below Is Consistent With The Purposes Of The Declaratory Judgment Act

As a "court of the United States" it is consistent with the express purpose of the Declaratory Judgment Act for the Court of Claims "to declare the rights and other legal relations" of both claimants and the United States in cases of "actual controversy" within its jurisdiction including, among other things, cases founded upon the Constitution, any Act of Congress, or any regulation of an executive department. The authority of the Court of Claims to declare the rights of a claimant and/or the United States with respect to an asserted "claim against the United States", whether in the ultimate it is determined a claimant may or may not be entitled to any monies due or that will be due in relation to the claim, is manifestly in accord with the intent of the Declaratory Judgment Act.

At the outset of its argument that the decision below is inconsistent with the purposes of the Declaratory Judgment Act the petitioner states: "As we indicated above, the Declaratory Judgment Act was intended to create 'a

procedure designed to facilitate the settlement of private controversies'" (Br. 22). (Citing S. Rep. No. 1240, *74th* Congress, 1st Sess. 11 (1935)). It then argues (Br. 22) that the controversy in the respondent's case is "public" rather than "private" (Br. 22). The reference to settlement of "private" controversies was made in connection with the 1935 amendment of the 74th Congress providing for the exception "with respect to Federal taxes" in § 405, Revenue Act of 1935, 49 Stat. 1014, 1027 [32], and not in connection with the enactment of the Declaratory Judgment Act in 1934 (48 Stat. 955) by the 73rd Congress. In speaking on the very question of the reference to "private" controversies Professor Borchard stated:

> "How the Government officials who advised the Senate Finance Committee acquired the idea that the declaratory procedure was designed to facilitate the settlement of 'private' controversies but not 'public' controversies, it is not easy to surmise. There was no justification for such a belief and the Committee was misled. Experience would indicate that the declaratory judgment is used very commonly in England and the United States to challenge the validity of public actions whenever it affects the rights or claims of private individuals or other public bodies". *Borchard, Declaratory Judgments,* at 854, (2d Ed., 1941).

A consideration which clearly negates the petitioner's argument that the provisions of the Declaratory Judgment Act are only applicable to "private" controversies is the fact that declaratory relief has been deemed proper

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[32] § 405, Revenue Act of 1935, 49 Stat. 1027 stated:

"(a) Paragraph (1) of section 274D of the Judicial Code (Public, Numbered 343, Seventy-Third Congress is amended by adding after the words 'actual controversy' the following: '(except with respect to Federal taxes)'.

(b) The amendment made by subsection (a) of this section shall apply to any proceeding now pending in *any* court of the United States." (Emphasis supplied).

in comparable federal litigation under the Suits In Admiralty Act,[33] the National Service Life Insurance Act,[34] the Trading With The Enemy Act,[35] and the Federal Tort Claims Act[36]. Also, the petitioner's argument appears to be inconsistent with its own actions wherein it has instituted proceedings seeking declaratory relief as in *Teplitsky* v. *Bureau of Compensation U. S. Department of Labor and United States of America, supra*, and *United States* v. *Reynolds Metals Company, supra.* Indicative of a Congressional intent not to exclude the application of the Declaratory Judgment Act to, among other things, all claims against the United States, such as under the Tucker Act, 28 U.S.C. § 1491, may reasonably be inferred or concluded from the very language used in the 1935 amendment providing for an exception "with respect to Federal taxes" only and not with respect to all claims against the United States. That is, had the Congress intended to exclude all claims against the United States the language of the exception in the 1935 amendment may well have stated "with respect to 'claims' [or 'all claims'] against the United States." There is nothing to show that such was intended by the Congress. These considerations clearly show that the decision below is not inconsistent with the purposes of the Declaratory Judgment Act.

As respondent has shown above, his case involves a "claim against the United States" within the purview of 28 U.S.C. § 1491 in that it is founded on Acts of Congress,[37] and regulations of an executive department,[38] as

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[33] *Luckenbach Steamship Co.* v. *United States, supra; American-Foreign Steamship Corp.* v. *United States, supra; American President Lines* v. *United States, supra*, note 9.

[34] *Unger* v. *United States, supra* note 10.

[35] *Brownell* v. *Ketcham Wire & Mfg Co., supra*, note 11.

[36] *Pennsylvania R.R. Co.* v. *United States, supra*, note 12.

[37] 10 U.S.C. § 1201, et seq.; 10 U.S.C. § 1552.

[38] Army Regulations 635-40A and 635-40B.

they pertain to his entitlement to disability retired pay. The issues pertinent to the adjudication of respondent's claim, as shown in the amendment to his petition (A. 41-42), involve the questions of whether he should have been retired by reason of physical disability in 1959 and whether his records should have been corrected to show his retirement by reason of physical disability. Contrary to the view expressed by the petitioner, the respondent's "basic complaint" is not against a "government official" (Br. 22) and it is not "an ordinary claim of improper action by a federal official" (Br. 23) whereby he should have brought an action in a district court for judicial relief—to seek a correction of his records. In neither his original petition (A. 3-6) nor in the amendment to the petition (A. 41-42), is respondent seeking a correction of his records. While the adjudication of the respondent's claim, as in any claim brought under the provisions of 28 U.S.C. § 1491, necessitates a judicial inquiry by the Court of Claims into the actions of a cognizant "government" or "federal" officials (such as the Secretary of the Army and/or his designees or administrative forums acting for and on behalf of the Secretary) and the interpretation of Acts of Congress and regulations of an executive department, the money relief that may be accorded the respondent, in the ultimate, is obtainable solely from the United States and not the "federal" or "government" officials.

To resolve the merit of a claim against the United States under 28 U.S.C. § 1491 necessitates the Court of Claims making an initial determination or declaration regarding the actions of cognizant agents of the United States (e.g. the Secretary of the Army or his designees) against the background of governing Acts of Congress and/or regulations of an executive department as to whether such actions caused him to be deprived of money otherwise due or that will be due the claimant. In this regard, it would appear that the following language from *Glidden Co.* v. *Zdanok*, *supra* (from which petitioner cited the "money judgment" doctrine), lends support to the re-

spondent's contention as to the appropriateness of declaratory judgment procedures being applicable to the Court of Claims:

> "The cases heard by the Court [of Claims] have been as intricate and far-ranging as any coming within the federal-question jurisdiction, 28 USC § 1331, of the District Courts. E.g. *Causby* v *United States*, 104 CtCl 342, 60 F Supp 751, remanded for further findings 328 US 256, 90 L ed 1206, 66 S Ct 1062 (eminent domain); *Lovett* v *United States* 104 CtCl 557, 66 F Supp 142, affd, 328 US 303, 90 L Ed 1252, 66 S Ct 1073 (bill of attainder); *Shapiro* v *United States*, 107 CtCl 650, 69 F Supp 205 (military due process). In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.
>
> Indeed, there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting. From the beginning it has been given jurisdiction only to award damages, not specific relief [Citing *United States* v *Alire, supra* and *United States* v *Jones, supra*] . . . No question can be raised of Congress' freedom, consistently with Article 3, to impose such a limitation upon the remedial powers of a federal court. *Lauf v E. G. Shinner & Co.*, 303 US 323, 330, 82 L Ed 872, 877, 58 S Ct 578 (Norris-LaGuardia Act). But far from serving as a restriction, this limitation *has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action.*" (370 US at 556-557). (Emphasis supplied).

Within this frame of reference, and especially as a "court of the United States" which the Court has viewed as having a "greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action", the granting of declaratory relief is surely compatible and

consistent with purposes of the Declaratory Judgment Act. By employing the procedural remedy available to the Court of Claims under the Declaratory Judgment Act, the Court of Claims, among other things, will be enhancing the expeditious administration of justice. In this regard, as the Court stated in *Glidden Co.* v. *Zdanok*, *supra*, in quoting President Lincoln's State of the Union Message in 1861: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals". 370 U.S. at 553.

In the light of the foregoing, it is urged that the decision below is patently consistent with the purposes of the Declaratory Judgment Act.

## CONCLUSION

For the reasons stated above, it is submitted that the Court should affirm the decision of the United States Court of Claims.

Respectfully submitted.

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No. 672



IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

---

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JOHN P. KING,

*Respondent.*

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On Writ of Certiorari to the
United States Court of Claims

---

## BRIEF FOR THE LINER COUNCIL, AMERICAN INSTITUTE OF MERCHANT SHIPPING, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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*MISCELLANEOUS*

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## INTEREST OF AMICUS CURIAE

In January 1969 the American Institute of Merchant Shipping succeeded to the functions of several organizations. Among these was the Committee of American Steamship Lines, which had been composed of thirteen of the fourteen companies parties to operating-differential subsidy contracts with the United States under the Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U.S.C. § 1101 *et*

*seq.* The concern of the American Institute of Merchant Shipping relating to that subsidy program is under the jurisdiction of its Liner Council, a semi-automonous component which is *amicus curiae* here.

For more than 30 years the bulk of the American liner fleet has been operated under the Merchant Marine Act, 1936. As the U.S.-flag lines must employ American seamen, they are paid under Title VI of that act an operating-differential subsidy designed to equalize their wage costs with those of their principal foreign competitors. As the U.S.-flag lines must build their vessels in American shipyards, the shipyard under Title V of the Act is paid a construction-differential subsidy designed to equalize the cost to the owner as compared to construction abroad.

The Merchant Marine Act uses as its basic operating instrument contracts between the United States and the ship operators and shipbuilders. Through these contracts, and the attendant regulations and instructions of the Maritime Administration,[1] the subsidized line is closely supervised as to every aspect of vessel operation and maintenance, sailing schedules and rates, vessel lay-ups, operation of unsubsidized vessels, and every detail of its financial transactions.

A very considerable proportion of the disputes which inevitably arise out of this maze of regulation and control relate to the obligations of the operator or of the United States under the operating-differential subsidy contract. Such disputes are apparently subject to review only in the Court of Claims. *American President Lines, Ltd. v. Federal Maritime Board,* 133 F. Supp. 100 (D.C.D.C. 1955), *aff'd* 235 F.2d 18 (D.C. Cir. 1956).[2] That review as to many

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[1] The administration of the subsidy program is currently the responsibility of the Secretary of Commerce, who acts through the Maritime Administration and the Maritime Subsidy Board. Reorganization Plan No. 7 of 1961, 75 Stat. 840; Department of Commerce Order No. 117-A, 31 Fed. Reg. 8087.

[2] The decision in *American Mail Line v. Gulick,* CADC 22,091 (1969), slip p. 15, assumes that such a controversy could be brought

claims cannot ordinarily be accomplished within a reasonable period of time, so long as the plaintiff must have in hand a fully matured claim for a money judgment. This is because of the procedures governing subsidy payments.

Decisions and orders of the Maritime Administration may be entered during the year of operation or a number of years later. In either case they to not readily translate into money claims until accounts have been struck for the year. The statute, with innocent optimism, provides that "The amount of such subsidy shall be determined and payable on the basis of a final accounting made as soon as practicable after the end of each year * * *." §603(a), 1936 Act, 46 U.S.C. §1173. The "final accounting" for the year can be completed only after all subsidy rates have been established. 46 C.F.R. §286.5(c) and (d). Before subsidy rates can be established there must under current procedures be a meticulous statistical determination of the principal foreign flag competition upon each route and then a painstaking investigation of the wage and other costs of those principal foreign operators. Pike & Fischer, Shipping Regulation, par. 186. The American costs are readily ascertainable but there is often protracted inquiry into whether one or another may be allowable for subsidy purposes. After the rates are established the annual "final accounting" must be prepared by the operator and minutely audited by the Maritime Administration. Only then can a voucher for annual subsidy be submitted. See, generally, Accounting Instruction No. 29, Pike & Fischer, Shipping Regulations, par. 510:29.

The necessity of awaiting completion of the annual final accounting before the operator can have a fully matured money claim in hand can involve delays of prodigious proportions. It can take many years before all the substantive issues relating to a given year of operations have been

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to that court. As the issue was neither argued nor briefed, we doubt that it overrules *American President Lines*.

decided.[3] That decision must be followed by the annual accounting and audit, each of breath-taking complexity, and the preparation and payment of the final voucher for the year.

The annual "final accounting" for many lines is not, however, by any means "final." The Merchant Marine Act provides for "recapture" of subsidy to the extent of 50 percent of earnings over 10 percent of "capital necessarily employed," based upon a cumulative 10-year period. § 605(5), 46 U.S.C. § 1176. Estimated accrued recapture, if any, is deducted from the annual payments. Accounting Instruction No. 29, *op. cit. supra.* In addition to this automatic reservation for future adjustments, each party may under the contract reserve from the final accounting other disputes. Art. II-24. The truly "final" accounting is not undertaken until completion of the ten-year recapture period, and only then can a really final voucher be submitted. The 10-year accounting and audit is itself a very slow procedure. *American President Lines, Ltd. v. United States,* 154 Ct. Cl. 695, 291 F.2d 931 (1961) and *Oceanic Steamship Co. v. United States,* 165 Ct. Cl. 217 (1964) each involved suits where the money claim accrued 10 years after the close of the recapture period.

It is only the rare dispute which can within several years progress to the point that the subsidized operator has in fact been denied a cash payment to which he feels entitled under his contract. Delays of a decade and more are not

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[3]Random illustrations may be drawn from the reports open to judicial notice. *American Mail Line, et al. - Manning Scales, C-4 Vessels,* 10 P&F SRR 678 (Nov. 18, 1968), review by Secretary pending, disallowed subsidy on certain positions effective May 23, 1961. *American Mail Line, et al. - ODS Rates (1962-1963),* 10 P&F SRR 711 (Nov. 22, 1968), review by Secretary denied Dec. 27, 1968, involved subsidy rates applicable almost 7 years before. *Collective Bargaining Agreement - Seamen's Medical Center,* 10 P&F SRR 765, and *Collective Bargaining Agreement, MSO Industry Termination Fund,* 10 P&F SRR 760, each decided Dec. 19, 1968, review by Secretary pending, each involve payments for 1961 and subsequent years.

unusual. Many of these disputes affect the actual vessel operations of the subsidized lines. Many others involve very large amounts of money, the uncertainty of which adversely affects the financial planning of the lines. In either case sustained delay in settling the issues under the contract is highly disadvantageous to the subsidized operator. We should suppose it also disadvantageous to the Government to have ancient disputes unsettled. Apart from its general interest in certainty of its obligations, and apart from the general responsibility of the Government to its citizens, the Maritime Administration is committed by the Congress to the development of an adequate merchant marine and that objective is surely not advanced by a lag of years or decades before fundamental issues with the operators can be settled.

The Liner Council of the American Institute of Merchant Shipping and its member lines have accordingly a major interest in the availability of declaratory relief in the Court of Claims. Its availability could often reduce the pre-suit waiting period by 5-10 years. The predecessor organization of *amicus curiae* filed a brief and presented oral argument as *amicus curiae* in the Court below. That Court was kind enough to note that this had been helpful [App. 14]. It is possible that an additional brief may aid this Court in its consideration and decision of the case. We accordingly file this brief as *amicus curiae* in support of the decision below. We file concurrently herewith the consent of both parties to this case to such a filing.

## OPINION BELOW - JURISDICTION - STATEMENT

These, so far as concerns the interest of *amicus curiae*, are satisfactorily stated in the brief for the petitioner (pp. 1-2, 3-5). It is necessary, however, to restate the "question presented" and the "statutes involved."

## QUESTION PRESENTED

Whether the Declaratory Judgment Act, 28 U.S.C. § 2201, empowers the Court of Claims to give declaratory relief in cases within its subject-matter jurisdiction.

## STATUTES INVOLVED

28 U.S.C. §451. *Definitions*

As used in this title:

> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> § 1491. Claims against the United States generally. * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * *

The Declaratory Judgment Act, 28 U.S.C. 2201, provides in pertinent part:

> §2201. Creation of remedy.
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

## SUMMARY OF ARGUMENT

The basic difference between the Solicitor General and *amicus curiae* comes down to a single word: whether the Declaratory Judgment Act is inapplicable to the Court of Claims because its jurisdiction is limited to "claims for the *present* recovery of money from the United States." If as we show below the Tucker Act jurisdiction includes monetary claims whether or not immediate payment can be demanded, the Declaratory Judgment Act is applicable by its terms and by its reasons to such monetary claims in the Court of Claims.

### I

A. We agree that the Declaratory Judgment Act does not expand the jurisdiction of any court, but simply supplies a new remedy for jurisdiction otherwise conferred. *Skelly Oil Co. v. Phillips Petroleum Co.*, 399 U.S. 669 (1950).

B. The Declaratory Judgment Act in 1934 was made applicable to the "courts of the United States." At that time the Court of Claims had recently been held to be a legislative not a constitutional court. *Ex parte Bakelite*, 279 U.S. 438 (1929); *Williams v. United States*, 289 U.S. 533 (1933). *Bakelite* explicitly recognized that the Court of Claims was nonetheless a "Court of the United States." 279 U.S. at 453. In any event, *Bakelite* and *Williams* have by the Congress in 1953 and this Court in *Glidden Company v. Zdanok*, 370 U.S. 330 (1962) been declared to have been wrongly decided.

If any doubt could be imported into the 1934 Act, none can remain after the 1948 codification, which in terms made the Declaratory Judgment Act applicable to "any court of the United States" and defined "court of the United States" to include the Court of Claims. 28 U.S.C. §§ 451, 2201.

C. In the course of enacting the Declaratory Judgment Act the Congress was on a number of occasions advised that it would apply to the "federal courts" and would cover disputes between the government and its citizens; the analogy between a declaratory judgment and the Court of Claims judgment, which could not be executed, was several times drawn. The 1935 exception of disputes "with respect to taxes" at least suggests that the Declaratory Judgment Act applied under the Tucker Act. The Congress seems never to have been advised of the Court of Claims 1935 decision rejecting declaratory relief, but last spring the Senate Committee on the Judiciary cited with approval the Court of Claims decision in the present case. S. Rpt. No. 1465, 90th Cong., 2d Sess., p. 3.

## II

A. The Government's whole argument is based upon the premise that the Tucker Act, in conferring jurisdiction over "any claim against the United States," really means only a claim for the *present* payment of money. The statute does not so provide. The private bill business of the Congress, which the Court was designed to relieve, was not so confined. And a broadly contemporaneous statute, authorizing an unmistakable declaratory judgment to settle disbursers' accounts, used the precise word "claim" to ground that jurisdiction.

B. The Solicitor General's argument derives not from the statute but from a short-hand phrase developed and correctly used in wholly different contexts. He relies upon an incomplete quotation from *Glidden*: "From the beginning

it has been given jurisdiction only to award damages, *not specific relief,*" (370 U.S. at 557), but omits the italicized words. From *United States v. Alire*, 6 Wall. 573 (1867) and *United States v. Jones*, 131 U.S. 1 (1889) onwards, it has been understood that the Court of Claims was without jurisdiction to render specific, coercive relief against a Government official. It has *not* been understood that it had no power to dispose of a monetary claim until the plaintiff could count up the exact number of dollars then due him.

C. The settled practice of the Court of Claims is almost exclusively that of rendering declaratory relief. Its "money judgments" cannot be executed, but only declared. These judgments are spent on the date of entry, but have a binding declaratory force as to the future. Rule 47(c), pursuant to which liability is determined while damages if any are reserved, provides what is a declaratory judgment and nothing else. No court could have a more congenial reception of the Declaratory Judgment Act than that of the Court of Claims.

III

A. It is true that the Court of Claims in *Twin Cities Properties v. United States*, 81 C.Cls. 635 (1935), held the Declaratory Judgment Act inapplicable. This was done in two cursory paragraphs, and the reasoning was based upon the misapprehension that the Declaratory Judgment Act broadened the jurisdiction of the courts to which it was applicable. That decision, until the present case, has been generally assumed to be correct, and a few actual decisions have followed it, but *no* court has ever given the issue careful consideration. When *Twin Cities* was subjected below to a careful and exhaustive examination, it was overruled by an unanimous court.

B. Declaratory relief is available in all other forms of suit against the Government official, the results of which are also *res judicata* against the United States in the Court of Claims. The lower federal courts have held it applicable

under the Suits in Admiralty Act, the Tort Claims Act, and the NSLI Act, each of which arise under similar grants of jurisdiction, as well as under the broad grant of the Trading With the Enemy Act.

## IV

There can be no valid ground of policy which would forbid that monetary claims against the United States be litigated while they are fresh, and require instead that they await instead the sometimes slow maturing of a claim for a defined number of dollars. The Court of Claims was, in truth, created for the very purpose of affording speedy justice.

When one looks to the facts of the *Twin Cities* case he finds that declaratory relief may, indeed, be as advantageous to the Government as to the Court of Claims plaintiff. The cost to the Government in having persuaded the court against anticipatory declaratory relief was four years of litigation, two subsequent decisions of the Court of Claims, and about $6,000,000 in double rent for eight years which might have been avoided had the rights of the parties been declared before the Government cancelled its lease.

## V

*Amicus curiae* urges that it be left to the court below to determine whether respondent's claim is in fact a monetary claim upon which declaratory relief can be awarded. The issue is complex and difficult, is of no general importance, and is not presented to this Court by the petition for writ of certiorari.

## ARGUMENT

The issue between the petitioner and *amicus curiae* comes down to a single word. The Government's basic argument as we read it runs: (a) The Declaratory Judgment Act does not expand the jurisdiction of the Court of Claims. (b) That jurisdiction is limited, by statute and by tradition, to "claims for the *present* recovery of money from the United States." (c) The Court is therefore without power to declare rights other than the amounts of money presently due the plaintiff.

If the word "present" were eliminated from the Government's analysis, there would remain no discernible difference between the Solicitor General and *amicus curiae.* We agree that the Declaratory Judgment Act does not expand the subject-matter jurisdiction of any court. We agree that the Tucker Act limits the jurisdiction of the Court of Claims and the district courts to monetary claims against the United States.[4] We differ only in respect to the Government's effort to convert the jurisdiction granted by 28 U.S.C. § 1491 from "any claim" into "any claim for the present recovery of money."

This is an exceedingly narrow area of controversy. Its resolution requires, however, a journey of some length. We show below that (i) the Declaratory Judgment Act must be read, as it is written, to extend this remedy to all courts of

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[4] The opinion below on occasion uses somewhat imprecise short-hand formulae: "controversies with a money cast," "money-related," "money-oriented" [App. 30, 31, 32]. But when it explains these short-hand formulae, it makes it wholly clear that they refer to cases where "the United States owes or will owe him money on account of some contract or provision of law" [App. 30], where the plaintiff asks relief "in order to be in a position to collect money from the United States, sometime in the future." [id.]. We prefer the short-hand "monetary claim," once used in the opinion below [App. 31] but do not consider that the Court below intended to cover into its jurisdiction any claim that would not at some point of time produce a defined money claim against the United States.

the United States; (ii) the Tucker Act jurisdiction is limited to monetary claims, but not to claims for an immediate payment of money; (iii) the lower court decisions supporting the Solicitor General are both few in number and unimpressive in authority; (iv) no reason of policy or practicality suggests that the Tucker Act and the Declaratory Judgment Act should be forcibly constricted so as to cover a smaller territory than that defined by their words; and (v) the Solicitor General cannot at this stage of the proceeding challenge the respondent's right to seek declaratory relief on the facts of this case.

## I

## THE DECLARATORY JUDGMENT ACT

### A. The Act Creates a New Remedy and Does Not Affect Jurisdiction

It is as important to our analysis as it is to the Government's that there be clear recognition, in the Government's words [Br. 9] that:

> "* * * the Declaratory Judgment Act itself cannot be a fountainhead of subject matter jurisdiction for the federal courts. It makes available a new procedure, but that procedure is limited to cases that come within the jurisdictional limits established by other provisions of the Judicial Code."

This shown on the face of the Act. 28 U.S.C. § 2201 authorizes "any court of the United States" to "declare the rights and other legal relations of any interested party" when such a declaration is sought "In a case of actual controversy *within its jurisdiction.*"

It is settled beyond dispute that the Act produces "changes merely in the form or method of procedure by which federal rights are brought to final adjudication" and "[t]he issues raised * * * are the same as those which under old forms of procedure could be raised * * *."

*Nashville, C. & St. L. Ry v. Wallace*, 288 U.S. 249, 264 (1933). "It does not purport to alter the character of the controversies which are the subject of the judicial power * * *." *United States v. West Virginia*, 295 U.S. 463, 475 (1935). The Court has variously recognized that "the operation of the Declaratory Judgment Act is procedural only," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); that in exercising "control of practice and procedure the Congress is not confined to traditional forms or traditional remedies." *Id.* at 240; and that "[t]he statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies both at law and in equity, which the Judiciary Acts had already conferred," *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943). Finally, in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 669, 671-72 (1950), the Court again explained that in passing the Declaratory Judgment Act: "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."

We have not, then, any question as to whether the Congress in the Declaratory Judgment Act intended to enlarge the jurisdiction of the Court of Claims, or to expand the types of cases in which it had waived the sovereign immunity from suit. The question is simply whether the Congress intended the Court of Claims to use this new procedure or new remedy within the confines of the jurisdiction already conferred by the Tucker Act.

### B. The Words of the Statute

The Declaratory Judgment Act as enacted in 1934 empowered "the courts of the United States" to grant declaratory relief. 48 Stat. 955.

The statute was enacted during the comparatively brief period in which the Court of Claims was viewed as a legislative, not a constitutional, court. *Ex parte Bakelite*, 279 U.S. 438, 452-457 (1929); *Williams v. United States*, 289

U.S. 533 (1933).[5] These decisions were disclaimed by the Congress in 1953 (67 Stat. 226) and overruled by *Glidden Company v. Zdanok*, 370 U.S. 330 (1962). The legislative or constitutional status of the Court of Claims is immaterial to the application of the Declaratory Judgment Act. In *Ex parte Bakelite*, the Court stated (279 U.S. at 453) that "Without doubt that court [Court of Claims] is a court of the United States within the meaning of §375 of title 28, U.S.C.[6] * * * but this does not make it a constitutional court." *Williams* contains nothing to qualify the recognition that the Court of Claims as a legislative court was a "court of the United States."[7] (b) If for any reason it were thought that only Article III courts can be

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[5]The Court of Claims was taken to be exercising judicial power admitting of Supreme Court review in *DeGroot v. United States*, 5 Wall. 419 (1867), the Congress having cured the revisory power of the Executive which precluded review in *Gordon v. United States*, 2 Wall. 561 (1865). It was thereafter assumed to be an Article III court. *E.g.*, *United States v. O'Grady*, 22 Wall. 641, 648 (1875); *United States v. Union Pacific R. Co.*, 98 U.S. 569, 603 (1879); *Miles v. Graham*, 268 U.S. 501 (1925).

[6]The Court here cited 21 Op. A.G. 449 (1896), holding the Chief Justice of the Court of Claims a "judge" of that Court and thus eligible for retirement at full pay as a "judge of any court of the United States," under R.S. § 714. Then § 375 of 28 U.S.C. related to the retirement of judges of courts of the United States.

[7]The territorial courts, with a restricted geographic jurisdiction and a presumably transitory life, are in contrast to the Court of Claims not "courts of the United States," for reasons very fully explained in *O'Donaghue v. United States*, 289 U.S. 516, 535-538 (1933); *Glidden Company v. Zdanok*, 370 U.S. 530, 544-548 (1962). Beyond that they are not included as a "court of the United States" in 28 U.S.C. § 451. In consequence the Declaratory Judgment Act has been held inapplicable to the territorial courts, *Reese v. Fultz*, 96 F. Supp. 449 (D. Alaska, 1951); *Ottley v. DeJough*, 149 F. Supp. 75 (D.V.I., 1957). When the *Reese* case was called to the attention of the Congress it amended § 2201 to apply to "any court of the United States and the District Court for the territory of Alaska." 68 Stat. 890 (1954).

"courts of the United States," both the Congress in 1953[8] and this Court in *Glidden* have declared *Bakelite* and *Williams* to have been wrongly decided.

Whatever doubt might be argued to be found in the words of the 1934 Act was removed in 1948, when the Judicial Code was revised and reenacted. The Declaratory Judgment powers in 28 U.S.C. §2201 were made applicable to "any court of the United States," and in 28 U.S.C. §451 (*supra*, p. 6) the Court of Claims was specifically included within the definition of a "court of the United States."

The Revisers of the 1948 Code were emphatic that they intended no change in law.[9] The explicit application of the Declaratory Judgment Act to the Court of Claims made in 1948 thus confirms the conclusion that the 1934 Act was also applicable. If, however, it were viewed as a change in law, the 1948 Code must govern. See *e.g., Ex Parte Collett*, 337 U.S. 55 (1949); *United States v. National City Lines*, 337 U.S. 78 (1949); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 376 nn. 11-12 (1949); *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247 (1953).

The Solicitor General, it will be noted, offers no rationale by which the explicit words of 28 U.S.C. §§451 and 2201 may be put aside. He has simply ignored the words of the statute.

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[8] 28 U.S.C. 171 was amended to declare that the Court of Claims is "a court established under Article III of the Constitution." 67 Stat. 226.

[9] The Revisers saw that "great care [was] exercised to make no changes in existing law which would not meet with substantially unanimous approval." S.Rpt. No. 1559, 80th Cong., 2d Sess., p.2. The explanation of the revision of § 2201 makes no reference to the Court of Claims, and §451 was explained as being "inserted to make possible a greater simplification on consolidation of the provisions incorporated in this title." 28 U.S.C. at 5913, 6026-6027 (1964)

## C. The History of the Act

1. *The Course of Enactment.* The first legislative proposal for adoption of federal declaratory judgment procedure was S. 5304 during the 65th Congress. The bill was sponsored by the American Bar Association. It made no progress during the 65th Congress. Identical bills were introduced in both houses in the 66th through 71st Congresses,[10] and while passed in the House in the 69th and again in the 70th Congresses,[11] did not receive Senate approval.

In the 72nd Congress, a revised version of the bill was introduced as H.R. 4624. The granting provision was revised to reflect some technical criticism of the bill, of no relevance to the issues now before this Court, made during hearings before a subcommittee of the Senate Judiciary Committee during the 70th Congress.[12] The revised version

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[10] S. 582, 66th Cong., 1st Sess. (1919); S. 4808, 66th Cong., 3d Sess. (1921); S. 629, 67th Cong., 1st Sess. (1921); H.R. 10143, 67th Cong., 2d Sess. (1922); S. 816, 67th Cong. 4th Sess. (1923); H.R. 5194, 68th Cong., 1st Sess. (1924); reported out of committee with H.R. Rep. No. 1441, 68th Cong., 2d Sess. (1925); S. 3675, 68th Cong., 2d Sess. (1925); S. 615, 69th Cong., 1st Sess. (1925); H.R. 5365, 69th Cong., 1st Sess. (1925); reported out of committee with H.R. Rep. No. 928, 69th Cong., 1st Sess. (1926); H.R. 5564, 70th Cong., 1st Sess. (1927); H.R. 5623, 70th Cong., 1st Sess. (1927), reported out of committee with H.R. Rep. No. 288, 70th Cong., 1st Sess. (1928), debated and recommitted, January 18, 1928, reported out of committee as amended with H.R. Rep. No. 366, 70th Cong., 1st Sess. (1928); H.R. 9028, 70th Cong., 1st Sess. (1928); H.R. 23, 71st Cong., 1st Sess. (1929), reported out of committee with H.R. Rep. No. 94, 71st Cong., 2d Sess. (1929); S. 2501, 71st Cong., 2d Sess. (1929).

[11] H.R. 5365, 69th Cong., 1st Sess. (1926), 67 Cong. Rec. 9546 (May 17, 1926); H.R. 5623, 70th Cong., 1st Sess. (1928), 69 Cong. Rec. 2032 (January 25, 1928).

[12] See *Hearings on H.R. 5623 Before a Subcommittee of the Senate Committee on Judiciary*, 70th Cong., 1st Sess. (1928). Professors Borchard of Yale and Sunderland of Michigan were the main wit-

was reported favorably by the Committee and passed by the House during the 72d Congress, and finally was enacted in 1934 during the 73d Congress as Public Law 73-343.[13]

Despite the long period during which the legislation was subject to consideration, and the importance of the subject matter, there is surprisingly little legislative material from which a close analysis of the statutory provisions can be derived. Thus, in the more than 15 years Congress had bills under review, committee hearings were conducted on only three occasions, and these in turn were quite brief.[14] There was virtually no floor debate in either house.[15] And not

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nesses during the two days of hearings. Members of the Subcommittee were concerned with matters irrelevant here. No consideration was given to the meaning of the phrase "courts of the United States" or to the precise courts which would be vested with the power to grant declaratory relief, although one Senator's suggestion that the court coverage be limited to federal courts sitting in states that already enjoyed declaratory judgment procedures was opposed by the witnesses. Hearings 40, 44-45.

[13]H.R. 4624, 72d Cong., 1st Sess. (1931), reported out of committee with H.R. Rep. No. 627, 72d Cong., 1st Sess. (1932), passed House, 76 Cong. Rec. 697-698 (December 19, 1932); S. 588, 73rd Cong., 2d Sess. (1934); H.R. 4337, 73rd Cong., 2d Sess. (1934), reported out of committee with H.R. Rep. No. 1264, 73d Cong., 2d Sess. (1934), passed House, May 7, 1934, 78 Cong. Rec. 8224, passed Senate, June 9, 1934, 78 Cong. Rec. 10919.

[14]*Hearings of Legislation Recommended by the American Bar Association*, Before the House Committee on the Judiciary, 67th Cong., 2d Sess. (February 21, 1922) 19 pp.; *Hearings on H.R. 5365 Before the House Committee on the Judiciary*, 69th Cong., 1st Sess. (March 25, 1926) 19 pp.; *Hearings on H.R. 5623 Before a Sub-Committee of the Senate Committee of the Judiciary*, 70th Cong., 1st Sess. (April 27 and May 18, 1928) 81 pp.

[15]Of the seven times the proposed act was on the House floor from 1925 through 1934, five times it appeared on the consent calendar, twice meeting objection from Representative Collins of Mississippi, 66 Cong. Rec. 4874 (1925 - 68th Cong., 2d Sess. – objected to); 67 Cong. Rec. 9546 (1926 - 69th Cong., 1st Sess); 75 Cong. Rec. 14091 (1932 - 72d Cong., 1st Sess. – objected to); 76 Cong. Rec. 697-698 (1932 - 72d Cong., 2d Sess.); 78 Cong. Rec. 8224 (1934 - 73d Cong., 2d Sess.). The other two times it was de-

only were all committee reports abbreviated, but those of the House committees were on all occasions virtually identical.[16] In the resulting materials, attention was focused on three principal issues: whether a declaratory judgment would be justiciable as a case or controversy; whether declaratory relief should be available at the instance of a single party, or whether consent of both opposing litigants should be required; and the *res judicata* implications of the judgment.

2. *Indicia of Coverage.* Although there was no specific discussion of the courts in which the procedures would be applicable, we believe such limited materials as do exist furnish strong indication that Congress viewed the legislation as applicable to the Court of Claims.

First, when the original legislation was introduced during the 65th Congress, it was accompanied by an explanatory memorandum written by Professor Borchard which cited litigation over "conflicting questions of title to certain funds * * * *between private individuals and the Government*" as one of the categories of cases covered by the legislation.[17]

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bated, but almost the entire debate concerned the act's constitutionality and its coercive rather than voluntary nature. 69 Cong. Rec. 1680-1688, 2025-2032 (1928 - 70th Cong., 1st Sess.).

[16] H.R. Rep. No. 1441, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 928, 69th Cong., 1st Sess. (1926); H.R. Rep. No. 288, 70th Cong. 1st Sess. (1928); H.R. Rep. No. 366, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 94, 71st Cong., 2d Sess. (1929); H.R. Rep. No. 627, 72d Cong., 1st Sess. (1932); H.R. Rep. No. 1264, 73d Cong., 2d Sess. (1934). The House reports were all two pages in length and differed only with respect to the exact language of the statute and the reference to the number of states with similar legislation. S. Rep. No. 1005, 73d Cong., 2d Sess. (1934) did not follow the House model.

[17] The Declaratory Judgment, Brief by Edward M. Borchard, printed for the use of the Senate Judiciary Committee in connection with S. 5304, 65th Cong., 3d Sess. (1919) (Emphasis supplied); the brief is no longer available but is said by the Fox Compilation on Declaratory Judgment (1937) to be the same as Borchard's articles in 28 Yale L.J. 1, 105 (1918).

This statement was repeated in the hearings, and was referred to by Representative Celler during debate on the floor of the House incident to passage of H.R. 5623, 70th Cong., 1st Sess. Incidental note was made in these references to declaratory judgments against the Government under the British and New York acts.[18]

Second, while there was no undertaking in the legislative materials to give specific content to the phrase "courts of the United States" as used in the bills, references throughout the materials identified the proposed procedure as applicable in "federal courts," suggesting that the term was to be given broad, rather than narrow interpretation.[19]

Third, there are references on several occasions to the Court of Claims itself. Thus in testifying before a subcommittee of the Senate Committee on the Judiciary during the 70th Congress, Professor Borchard in explaining the uses to which the declaratory judgment could be put noted that:[20]

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[18] *Hearings on Legislation Recommended by the American Bar Association before the House Committee on the Judiciary,* 67th Cong., 2d Sess. 11 (1922); 68 Cong. Rec. 1687, 2029 (1928).

[19] *Hearings on Legislation Recommended by the American Bar Association before the House Committee on the Judiciary,* 67th Cong., 2d Sess. 5, 11 (1922); *Hearings on H.R. 5623 Before a Sub-Committee of the Senate Committee on the Judiciary,* 70th Cong., 1st Sess. 14, 25, 26, 27, 28, 38, 39 (1928).

In House debate on one of the early bills, it is true, a statement was made by Committee Chairman Montague that the Act "applies to Federal district courts and the courts in the District of Columbia." 66 Cong. Rec. 4874 (1925). But nothing in the context in which the statement was made suggests that it was meant to be a formal definition of the scope of the Act, particularly since Montague went on to point out that it only applied to "courts of original jurisdiction," which quite clearly would include the Court of Claims.

[20] [Hearings on H.R. 5623 before the Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., p. 21 (1928) (emphasis supplied).]

> "You can get a declaratory judgment for damages rather than a coercive decree. *For example, every judgment of the Court of Claims of this country is a declaratory judgment.*"

And in the final Senate Committee Report on the legislation, this statement of Borchard's was repeated and enlarged upon:[21]

> "The fact is that the declaratory judgment in a limited form has been known to the common law, or under statute, for many years . . . [O]ther illustrations that will readily occur to the lawyer are all cases in which declaratory judgments are rendered under other names. *The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution.*"

3. *The Tax Exception.* In 1935 the Agricultural Adjustment Act was amended to bar declaratory relief against taxes imposed under that Act, 49 Stat. 750. A week later the Declaratory Judgment Act was amended to except disputes "with respect to taxes." 49 Stat. 1014, 1027. In 1935 suit for tax refund could be brought either against the Collector in the District Court or against the United States under the Tucker Act, which limited District Court jurisdiction to claims under $10,000 unless the Collector was dead or out of office. *Flora v. United States,* 362 U.S. 145, 152-153, 188-190 (1960).[22] When the suit against the Collector was restored by statute it became "in its nature a remedy against the Government" *Curtis's Administratrix v. Fiedler,* 2 Black 461, 479 (1863); *Flora v. United States, supra,* at 153. The 1935 exceptions of disputes over tax claims from the Declaratory Judgment Act were enacted because of concern that the statute otherwise would interfere

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[21] S. Rpt. No. 1005, 73d Cong., 2d Sess., pp. 4-5 (emphasis supplied).

[22] 24 Stat. 505; Section 1310(c) of the Revenue Act of 1921, 42 Stat. 311, as amended, 43 Stat. 972 (1925); Act of February 26, 1845, c. 22, 5 Stat. 727.

with the "orderly and prompt determination and collection of federal taxes." S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).[23] Obviously, there would have been no cause for this concern if the Declaratory Judgment Act had not been viewed as applicable to litigation under the Tucker Act and under similar statutes waving sovereign immunity for claims against the United States. There is nothing in the legislative history to suggest that the 1935 exception was directed only to suits against the Collector and not to the Tucker Act.[24]

4. *Subsequent History.* We have found no indication that the failure of the Court of Claims to utilize declaratory judgment procedures was ever called to the attention of Congress prior to the decision now under review.[25]

[23]S.Rep. No. 1240 was directed to the Declaratory Judgment Act amendment. The reports on the Agricultural Adjustment Act similarly explain the purpose "to prevent the difficulties and embarrassments to the administration of the act which such actions cause and to confine the taxpayer to the usual and orderly procedure of paying the tax and then suing for refund." S. Rpt. No. 1011, 74th Cong., 1st Sess., p. 23 (1935); H. Rpt. No. 1241.

[24]See S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 1885, 74th Cong., 1st Sess. 13 (1935); 79th Cong. Rec. 13227-28 (1935); Borchard at 850-57.

The position of the Department of Justice in 1935 was (a) Congress never intended to apply the declaratory judgment procedure to tax matters because the revenue laws constituted a self-sufficient system of tax collection and protest separate from and unaffected by procedures of general utility not specifically declared applicable in tax matters, and (b) the amendments contained in the Revenue Act of 1935 and the Act of August 24, 1935 eliminated any doubts that may have existed as to the soundness of that conclusion. Department of Justice, Tax Division, Memorandum in regard to the Applicability of the Federal Declaratory Judgment Act to Suits Involving Federal Taxes, September 20, 1935 (contained in the Fox Compilation on Declaratory Judgments (1937), at pp. 15-22, 32-33. Nowhere in this exhaustive memorandum does the Department assert that the Declaratory Judgments Act is inapplicable to suits against the Government in the Court of Claims or elsewhere.

[25]In the nature of the inquiry we cannot represent that there is nothing we could have overlooked in the years since the Declaratory

In 1968, however, the Senate considered S. 1704, 90th Congress, which would authorize the Court of Claims to issue all orders available to a district court in a suit against the United States. It did not reach House Committee consideration but passed the Senate after a report which accepted as correct the present decision.[26]

5. *The Petitioner's Argument.* The Government's brief deals with this considerable body of legislative history in a few scattered sentences and phrases [Br. 8, 11, 17, 22]. It twice places some reliance [Br. 8, 22] on a phrase in the Senate report dealing with the 1935 tax amendment to the

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Judgment Act was enacted. We have, however, reviewed every amendment proposed with respect either to that Act or to the jurisdiction of the Court of Claims, and can say that we would be surprised if the Congress had at any time been advised of this apparent restriction of the scope of the declaratory judgment relief.

Compare Public Law 83-682 under which Congress made the Declaratory Judgment Act applicable to Alaska when the decision in *Reese v. Fultz, supra,* holding the Act inapplicable to the District Court of Alaska, was called to its attention.

[26]S. Rpt. No. 1465, 90th Cong., 2d Sess. (July 25, 1968), p. 3, reads:

> "Declaratory judgment actions also present an area in which there is a need to broaden the Court of Claims remedial power. In *John P. King v. United States* (Ct. Cl. 1968), the power of the Court of Claims to grant declaratory judgments pursuant to 28 U.S.C. 2201-2202 was established. However, at present the power of the court to grant further relief as an adjunct to its declaratory judgments is not clear. The enactment of S. 1704 will broaden the relief which the court can give a claimant pursuant to 28 U.S.C. 2202 where the court decides that a claimant is entitled to a declaratory judgment but cannot recover any money. For example, an illegally discharged Government employee may, after the passage of S. 1704, bring a suit in the Court of Claims to recover back pay and, at the same time, seek restoration of his former position. If the evidence demonstrates that the employee's earnings during the period of his illegal discharge exceeded his Government pay, the court's judgment on the illegal discharge would be limited to a declaratory judgment, but it could as an incident of such a judgment order him reinstated."

Declaratory Judgment Act, that the Act provided "a procedure designed to facilitate the settlement of private controversies." S. Rpt. No. 1240, 74th Cong., 1st Sess. p. 11. This cannot be read to suggest that the Declaratory Judgment Act was inapplicable to the Court of Claims, but in context was simply designed to contrast tax with other litigation. The 1935 amendment was added to the House-passed bill by the Senate Finance Committee, without prior discussion in hearings. The Committee's Report asserts that application of the Act to taxes would be a "radical departure from the long-continued Congressional policy with respect to taxes." It then states that this policy should not be disturbed by engrafting the declaratory judgment procedure ("a procedure designed to facilitate the settlement of private controversies") upon tax litigation.[27] This is quite insufficient to overcome the natural inference that the 1935 amendments were necessary precisely because the declaratory judgment would otherwise have been available in suits against the United States.

For the rest, the petitioner shows nothing contrary to our analysis except for a statement that S. 1704, 90th Congress, in which the Senate Committee accepted and approved the decision below, "died in the House." As it reached the House only on July 29, 1968, its death was hardly premeditated execution.

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[27]S. Rep. 1240, 74th Cong., 1st Sess. (1935), at p. 11. The Committee in essence adopted the position of the Department of Justice that tax litigation was and should remain a self-contained system (fn. 24, *supra*). A minority of the Committee saw no difficulty in applying the Act to tax matters and recommended that it be amended specifically to apply to all taxes not within the jurisdiction of the Board of Tax Appeals. *Id.* Pt. 2 at p. 9.

## II

## THE TUCKER ACT

The whole foundation of the Government's case is, as we have indicated (*supra*, p. 11), a belief that the Tucker Act extends jurisdiction to the Court of Claims, and waives the sovereign immunity to suit, only with respect to a claim for an immediate payment of money. This in turn derives not from the statute but from a phrase – "money judgment" – often used to describe the jurisdiction of the court below. That phrase was a useful shorthand in the context of the issues where it was used, but cannot possibly be taken as a rigid statutory limitation of jurisdiction.

### A. The Statute

The Tucker Act, 28 U.S.C. §1491, grants jurisdiction to the Court of Claims –

> "to render judgment upon any claim against the United States founded either upon the Consitution, any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

One obviously has a "claim" against the Government whether it is embodied in an immediate demand for a defined number of dollars or whether its monetary impact cannot yet be accurately measured. There would be a nice question if the statute, as the Government's argument, referred only to a "present claim;" one could argue either way as to whether one had a "present claim" which could not yet be measured in a precise number dollars. But there is *no* question, under the words as they were enacted. The Government's case requires that the phrase enacted by the Congress be changed to read –

> * * * to render judgment upon any claim against the United States, *for the present payment of money*, founded * * *

That is a rather ambitious program of statutory construction. It is not in any way achieved by pointing to the evident fact that the historical foundations of the Court of Claims trace to the desire of the Congress to have a special tribunal to consider the matters otherwise presented by private bills [Govt. Br. 16-17]. In the first session of the 49th Congress, immediately before the passage of the Tucker Act, only 10% of the private acts called for the payment of money presently due. In the first session of the 33d Congress, immediately prior to the first Court of Claims legislation, only 45% of the private acts called for the payment of money presently due.[28] It is not possible to determine how many of the other private acts would have been appropriate under 20th century practice for declaratory relief, nor how many of the money payment bills would have been more sensibly handled by such a procedure.[29] But it is clear that the private acts of Congress dealt with many claims other than for the present payment of money, and the historical occasion for the Tucker Act affords no warrant for reading "claims" so narrowly.

It should finally be noted that 28 U.S.C. § 1496 authorizes the Court of Claims to relieve disbursing officers of liability for lost money or records. This is unmistakably declaratory relief (see *infra*, p. 32). Section 1496 is worded: "The Court of Claims shall have jurisdiction to render judgment upon any *claim* by a disbursing officer * * *." It would require a rather intricate explanation to show why "claim" in §1496 grounds a declaratory judgment and yet the same

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[28]The private acts in these two sessions are tabulated, with probably excessive diligence, in the Appendix to this brief, *infra*.

[29]The Act of August 1, 1854, is one random example. It directed payment of $8,005.43 to the estate of General Nathanial Greene, with interest at 6% since July 6, 1794, for expenses arising out of the Revolution. One would judge that it took 15 years to crystallize the money claim and then 60 years to collect it. It would seem likely that at some stage during the 75 years declaratory relief would have been advantageous to both parties.

word "claim" in §1491 grounds only a judgment for money presently due.[30]

### B. The "Money Judgment" Formula

We come here to the heart of the Government's position. The Solicitor General in a single paragraph [Br. 10] asserts that repeated decisions of this Court limit "the jurisdiction of the Court of Claims to cases involving a demand for a money judgment." Upon this paragraph his whole argument turns.

Our reply is most simply made by completing the partial quotation from *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962), upon which the Government chiefly relies: "From the beginning it has been given jurisdiction only to award damages, *not specific relief*." The three italicized words are omitted by the Solicitor General. When they are included, they show that the "money judgment" formula has been used, in *Glidden* as in its predecessors, to contrast a money claim with specific, coercive relief against a Government official. In that context, it is incontestably accurate. But the formula is put to an unintended use when the accident of its phrasing is made the foundation of an argument that the Tucker Act "claim" for money cannot occasion declaratory relief at any point prior to its final crystallization into a defined number of dollars.

The "money judgment" description of the Court of Claims jurisdiction traces back to *United States v. Alire*, 6 Wall. 573 (1867). The Court of Claims, shortly after its reorganization by the Act of March 3, 1863, 12 Stat. 765, had

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[30] That explanation does not arise in the prior texts of the acts. The 1911 Judicial Code conferred jurisdiction in §145, First [predecessor of §1491] over "all claims (except for pensions)" and in §145, Third [predecessor of §1496] over "The claim of any * * * disbursing officer." 36 Stat. 1136. The Tucker Act in §1 [predecessor of §1491] gave jurisdiction over "all cl... s founded * * *." 24 Stat. 505. The Act of May 8, 1866 in §1 [predecessor of §1496] gave jurisdiction over "the claim of any * * * disbursing officer." 10 Stat. 44.

ordered the appropriate official to issue a warrant for "bounty" lands. This Court reversed because §7 of that Act made provision only for the payment of money judgments and had no reference to specific relief; the statute must accordingly be confined "to cases in which the petitioner sets up a moneyed demand as due from the Government" (6 Wall. at 576).

*Alire* was followed by *United States v. Jones*, 131 U.S. 1, 19 (1889), arising under the Tucker Act. The circuit court acting under that jurisdiction had directed the issuance of patents to timber lands. The Court held that, in the absence of provisions "for carrying into execution of decrees for specific performance, or for delivering the possession of property in kind," the Tucker Act jurisdiction remained limited to "money decrees and money judgments." Any other result would be anomalous:

> "... we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts—which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims.* * * *" *Id.* at 19.

*Alire* and *Jones* establish that the Court of Claims has no power to grant specific or coercive relief against any Government official. It seems to follow, as they held, that its jurisdiction is limited to "money demands" (6 Wall. at 576), "money claims" (131 U.S. at 19), "claims for money" (131 U.S. at 17, 18), "claims for money only" (131 U.S. at 17), or "moneyed demands" (6 Wall. at 576, 131 U.S. at 17). But it does not at all follow that a monetary claim lies outside the jurisdiction of the court simply because it is not when the petition is filed reduced to a specific claim for a specified number of dollars. At the time of *Alire* and *Jones*, to be sure, a money judgment was the only relief available by which to dispose of a monetary claim. After the Declaratory Judgment Act, an alternative form of relief was avail-

able to dispose of that sort of claim. Any argument that "jurisdiction" is limited to the forms of relief available prior to the Declaratory Judgment Act would make the Act inapplicable to every court, since as the parties agree that Act does not expand the jurisdiction of any court.

This Court has on a number of occasions repeated the "money judgment" phrasing of *Alire* and *Jones*, but always in a context quite irrelevant to the issues here. In *Glidden*, as we have seen (*supra*, p. 26) the contrast between monetary claim and specific relief is specifically drawn. In *United States v. Sherwood*, 312 U.S. 584 (1941), the Court held there was no Tucker Act jurisdiction of a claim against the United States possessed by the plaintiff's judgment debtor; it noted that the Court of Claims "jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States [citing *Alire* and *Jones*] and if the relief is sought against others than the United States the suit [is] * * * beyond the jurisdiction of the court" (312 U.S. at 588); the Court's attention was naturally directed to the jurisdiction over parties other than the United States and not at all to the issue here.[31] In *United States v. Jones*, 336 U.S. 641, 670-671 (1949), the Court held that district court review of a railway mail pay order was appropriate; and that the Court of Claims had no jurisdiction, *inter alia*, because "the Court of Claims has jurisdiction only to render a money judgment against the United States and none to remand to the Commission * * *" While we have doubt that the reasoning on this point retains much substance after *United States v. Bianchi & Co.*, 373 U.S. 709, 717-718 (1963), this is simply another application of the contrast

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[31] The Government's heavy reliance upon Sherwood [Br. 14-15] does not take into account the fact that *Glidden* overrules two of the *Sherwood* dicta: (a) that the Court of Claims is a legislative court, and (b) that only for this reason can a jury trial be eliminated (312 U.S. at 587; 370 U.S. at 572).

between a monetary claim and a specific direction that Government officials take prescribed action.[32]

### C. The Settled Jurisdiction and Practice of the Court of Claims

The Court of Claims in *Twin Cities Properties, Inc. v. United States*, 81 C.Cls. 655, 658 (1935), discussed more fully below, stated that declaratory relief was "foreign to any jurisdiction this court has heretofore exercised." This, as the court below showed [App. 26-28], is extravagantly wrong.

1. *The Money Judgment*: The very "money judgment" upon which the Government insists is itself only a declaratory judgment, for the Court of Claims has no power of execution. *Yale & Towne Mfg. Co. v. United States*, 67 C.Cls. 618 (1929); *Hatfield v. United States*, 78 C.Cls. 419 (1933). The declaratory nature of the Court of Claims judgments was emphasized in the course of enacting the Declaratory Judgment Act, both in the testimony of Professor Borchard and in the report of the Senate Committee (*supra*, pp. 19-20). The unenforceable nature of the Court of Claims judgment was relied upon by this Court in *Nashville, C. & St.L. Ry. v. Wallace*, 288 U.S. 249, 263 (1933) to show the justiciability of a state declaratory judgment proceeding. Conversely, *Aetna Life Insurance Co. v.*

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[32] *Bonner v. United States*, 9 Wall. 156 (1870); simply held that inability to take the bounty land promised by Virginia, even though caused by the United States, did not present a claim under a law or contract of the United States.

The Court of Claims cannot award nominal damages. Whatever the reason for the rule (which is merely stated but not explained in the cases cited by the Government [Br. 10]), it applies also in admiralty. *The Hunstonworth*, 4 F. Supp. 656 (E.D. N.Y., 1933); *The Thrasyvoulos*, 28 F. Supp. 434, 437 (S.D. N.Y.). It is, therefore, unrelated to the power to give declaratory relief (see, *infra* p. 40). Declaratory relief, moreover, is available only to resolve actual controversies in which the plaintiff has a practical, nor merely a theoretical, interest. *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 243 (1952).

*Haworth*, 300 U.S. 227 (1937), sustaining the Declaratory Judgment Act, has been relied upon to show the justiciability of cases arising under the miscellaneous jurisdiction of the Court of Claims. *Glidden Company v. Zdanok*, *supra*, 574.

2. *Prospective Force*. The "money judgment" of the Court of Claims is formally exhausted upon its entry. But none can doubt that it also declares rights for the future, and that the Government officials and citizens affected will each conform their future conduct to this declaration of legal right. It serves as to the future the precise office of a declaratory judgment.

This is not only a rule of practical conduct but, on the ground of collateral estoppel, is enforced by the Comptroller General. Thus, a 1956 Court of Claims decision determining the proper level of retirement pay must be applied for the period after judgment. Opinion B-129914, 36 Comp. Gen. 501 (1957). See, too, Opinion B-114422, 36 Comp. Gen. 489 (1957); Opinion B-142326, 44 Comp. Gen. 821 (1965). See generally, *Meador, Judicial Determination of Military Status*, 72 Yale L.J. 1294, 1304-07 (1963).[33]

If, however, the Government officials should for any reason refuse to apply in the future the law declared in the Court of Claims decision, the earlier decision will be applied as *res judicata*, or by collateral estoppel, so soon as the plaintiff should present to the Court of Claims a petition for subsequently accrued amounts. See, most notably, *Moser v. United States*, 42 C.Cls. 86 (1907); *Jasper v. United States*, 43 C.Cls. 368 (1908), reversing the *Moser* rule because of a statute overlooked in *Moser*; *Moser v. United States*, 49 C.Cls. 285 (1914), holding the earlier decision *res judicata*; 239 U.S.

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[33]The Comptroller General has, however, refused to give collateral estoppel effect to issues, such as right to office, in which the Court has held itself without jurisdiction, Opinion B-142023, 42 Comp. Gen. 323 (1962), and in cases where the United States has confessed liability so that there was no adjudication of issues by the Court, Opinion B-135719, 43 Comp. Gen. 266 (1963).

658 (1915), appeal by United States dismissed on its motion; 239 C.Cls. 658 (1915); 53 C.Cls. 639 (1918); 58 C.Cls. 164 (1923); *United States v. Moser*, 266 U.S. 236 (1924), holding the first decision conclusive.

3. *Rule 47(c).* Rule 47(c) of the Court of Claims provides in part—

> "* * * a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings.
>
> "(2) * * * the court, upon entering judgment that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings. In such event, the judgment on the question of the right to recover shall be final, * * *"

Rule 47(c) judgments are declaratory judgments and nothing else.[34] Their validity does not in any way turn upon whether or not the plaintiff subsequently recovers a money judgment.[35] Thus, the court below said [App. 27]:

> "It is not unknown for a plaintiff with a holding of liability to find himself unable to obtain a money judgment. In contract matters he may be unable to prove damages; in personnel removal cases (civilian or military) he may have had more outside earnings than his government pay or he may be unable to prove that he was ready, willing, and able to work during his unlawful separation."

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[34] They are also final judgments for purposes of the certiorari jurisdiction of this Court. *United States v. Adams*, 383 U.S. 39 (1966); *Peartree, Statistical Analysis of the Court of Claims*, 55 Geo. L.R. 541, n. 38 (1967).

[35] As the court below noted of *Everett v. United States*, 169 C.Cls. 11 (1965), the Court in determining liability under Rule 47(c) may reach conclusions which made it conclusive that the plaintiff can recover no damages. As it chanced, *Everett* was left in a position to recover a trifling amount for accrued sick leave when discharged. 169 C.Cls. at 62.

Often, too, a plaintiff who obtains a declaration of liability under Rule 47(c) may obtain the necessary adjustments in his continuing accounts with the Government so that there is no occasion to proceed to money judgment and the suit is dismissed after the declaration of rights.[36] In any of these variations, the court is granting declaratory relief, nothing more and nothing less.

4. *Miscellaneous Jurisdiction.* The Court of Claims has two collateral sources of jurisdiction which similarly will call for a declaration of rights rather than a money judgment.

(a) The plaintiff who seeks to settle his account with the United States under 28 U.S.C. §1496 may often, as in *Shaw v. United States*, 174 C.Cls. 899 (1966), be seeking only a declaration of no liability.

(b) The court is given explicit and exclusively declaratory jurisdiction by 28 U.S.C. §1497, authorizing "judgment upon any claim by a disbursing officer * * * for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge."

In sum, the Court of Claims in one view enters nothing but declaratory judgments and in any view has a broad and varied practice which unmistakably involves declaratory relief. Of all the courts of the United States it would seem most congenial to reception of Declaratory Judgment Act forms of relief. The court below quite properly refused to give the short-hand phrase "money judgment" an overriding force so that it could be applied, far out of context, both to restrict the scope of the Declaratory Judgment Act and to limit the traditional functions of the Court of Claims.

5. *Equitable "Jurisdiction."* We note, only out of completeness, that the inquiry is not advanced by pinning the label of "equitable relief" upon the Declaratory Judgment

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[36] It is not possible from the published reports to determine the cases in which this was done. We should suppose it to be a frequent occurrence. One example is *American President Lines, Ltd. v. United States*, 154 C.Cls. 695, 754 (1961).

Act and supplying a middle premise that the Court of Claims has no equitable jurisdiction. We do not understand the Government directly to press this argument [Br. 13-14]. It could not in any case be sustained. (a) The declaratory judgment has elements of equity relief, particularly in its origins and in that its grant lies within the discretion of the Court. *Eccles v. Peoples Bank*, 333 426, 431 (1948); *Great Lakes Co. v. Huffman*, 319 U.S. 293, 300 (1943). But it is not an equitable proceeding, being "neither distinctly in law nor in equity, but *sui generis*." S.Rpt. No. 1005, 73d Cong., 2d Sess., p. 6 (1934); *Sanders v. Louisville & N.R.R.*, 144 F.2d 486 (CA 6, 1944). (b) Nor for that matter is the Court of Claims an alien to equitable remedies. In disposing of money claims it may supply equitable relief, such as the reformation of contract, incident to that adjudication. *United States v. Milliken Imprinting Co.*, 202 U.S. 168 (1906); *District of Columbia v. Barnes*, 197 U.S. 146 (1905); *Aetna Construction Co. v. United States*, 46 Ct. Cl. 113 (1911). Since, in our view, declaratory relief can be considered only in respect to a monetary claim it would, even if characterized as "equitable" in nature, fall well within the traditional incidental powers of the Court of Claims. (c) Beyond all that, of course, is the fact that if as we have shown the Declaratory Judgment Act does apply, it is quite immaterial whether the remedies it has extended are differently labelled than those usually exercised by the Court of Claims.

## III

## THE DECISIONS INVOLVING DECLARATORY JUDGMENT IN SUITS AGAINST THE UNITED STATES

We consider that the case based upon analysis of the statutes is overwhelming that the Declaratory Judgment Act is applicable to cases within the Tucker Act jurisdiction. We must nevertheless recognize that, until the decision below, it has been generally stated or assumed, and occasionally held, that the Tucker Act permits no declaratory relief. At the same time it has been generally accepted that declaratory relief is available in all other forms of suit against the United States.

As we indicate below, the general understanding and course of decision under the Tucker Act did not rest upon any close analysis of the statutes by any court or commentator, but reflected at the most the same simple out-of-context application of the phrase "money judgment" which the Solicitor General advances here. We consider that the reversal, by a unanimous court below, of its 1935 decision in *Twin Cities Properties v. United States*, 81 C.Cls. 655, and of its successors, is itself dramatic evidence of the weakness of that rule once a careful examination of its foundations is made.

### A. The Tucker Act

1. *Court of Claims*. This Court has never had occasion to consider the issue. The supposed rule against declaratory relief under the Tucker Act derives, therefore, directly or immediately from *Twin Cities Properties v. United States*, 81 C.Cls. 635 (1935). The case was decided very shortly after enactment of the Declaratory Judgment Act, and disposed of the issue in two short paragraphs. Plaintiff sought a declaration that the Post Office Department was not contractually entitled to terminate its lease of plaintiff's property in advance of the term of the lease. The Court dismissed, simply stating (81 C.Cls. at 658):

"* * * We think the defendant's motion should be sustained. In the case of *Pocono Pines Assembly Hotels Co. v. United States*, 73 C.Cls. 447, we had occasion to discuss *in extenso* the jurisdiction of this court, and in view of the axiomatic legal principle that the United States may not be sued without its consent, we think it exacts a specific statute according such consent and expressly conferring jurisdiction upon this court before we may proceed. *United States v. Milliken Imprinting Co.*, 202 U.S. 168; *Eastern Transportation Co. v. United States*, 272 U.S. 675; *United States v. Michel*, 282 U.S. 656.

"If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised."

None of the four cases cited in *Twin Cities* is relevant to its decision.[37] The text of the Court's discussion indicates that it viewed the Declaratory Judgment Act as expanding the jurisdiction of the courts to which it was applicable, a view which is untenable in the light of subsequent decisions (*supra*, pp. 12-13; Gov't Br. 8-9). The Court gave no atten-

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[37] *Pocono Pines* was a prolonged discussion of the development of the Court of Claims jurisdiction, demonstrating that the Court acts in a judicial capacity. Aside from incidental references to its "money judgment" jurisdiction, there is nothing in the decision in any way suggesting reasons why declaratory procedures would be inappropriate to the Court. *Milliken* held that the Court of Claims has jurisdiction to reform a contract, and like *Pocono Pines* has significance only in a passing suggestion that the Court's traditional jurisdiction must involve a claim for money judgment. The two other cases cited, *Eastern Transport* and *Michel*, simply state that the waiver of sovereign immunity must be founded on statute.

tion to either the words or the history of the Declaratory Judgment Act.[38]

The *Twin Cities* rule, however rudimentary its reasoning, has been accepted by the Court of Claims until its reexamination here. That acceptance has usually been by way of dicta, in cases where there was not in any event subject-matter jurisdiction in the Court,[39] or where the issue related to taxes and was excepted from the Declaratory Judgment Act.[40] There are, however, two cases which seem to us either square or alternate holdings reaffirming *Twin Cities*. These are *United States Rubber Co. v. United States*, 142 C.Cls. 42, 55 (denying declaratory judgment for period after judgment) and *Prentiss v. United States*, 115 C.Cls. 78, 81 (1949) (denying a declaration that entitled to a pension). *U.S. Rubber* simply noted and relied upon *Twin Cities* without further examination, and *Prentiss* simply cited the *Jones* case for the proposition that the Court of Claims can only render judgments for money presently due.

2. *The District Courts.* The cases arising in the district courts which touch upon the use of a declaratory judgment under the Tucker Act are numerous. There would seem to be no gain to the Court if we undertook to duplicate the exhaustive analysis and classification of decisions which was so carefully made by the court below [App. 15-19]. It is sufficient that there are a good many cases which assume or state that declaratory relief is not available under the Tucker Act, but only one district court case which actually

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[38]We have examined the briefs filed with the Court of Claims in *Twin Cities* and note that neither of the parties to that proceeding called to the Court's attention the legislative history of the Declaratory Judgment Act which we find persuasive of a congressional intention to include the Court of Claims within the provisions of the Act.

[39]*Hart v. United States*, 91 C.Cls. 308 (1940); *Kelly v. United States*, 133 C.Cls. 571 (1956); *Rolls-Royce Ltd. v. United States*, 176 C.Cls. 694, 701-702 (1966).

[40]*Sweeney v. United States*, 152 C.Cls. 516 (1961).

so holds. We shall here take note of the decisions which the Solicitor General says [Br. 12-13] are in conflict with the result below. For the rest, we do not consider that the analysis of the court below can be improved upon.

The Government lists nine court of appeals decisions as in conflict with the result below. In each of those cases the underlying controversy was held to be outside the court's jurisdiction, which the courts properly held was not expanded by the Declaratory Judgment Act. The actions were to compel employment by the Government,[41] to review agency action where the statute precluded, or was thought to preclude, review,[42] to fix for federal tax purposes the allocation of partnership income,[43] to declare the good time allowance of a federal prisoner who had not exhausted his administrative remedies and presented no actual controversy,[44] to prevent the sale of Government-owned property,[45] to declare against the United States the wheat quota legislation unconstitutional,[46] to hold the United States for breach by a service man of his assignment of pay,[47] to void against the United States an assignment of property,[48] and to obtain review of a compensation award expressly forbidden by statute.[49] From the premise that there was no jurisdiction of the subject matter, neither the court below nor *amicus curiae* would reach a different result in any of these cases.

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[41] *Love v. United States*, 108 F.2d 43 (CA 8, 1939).

[42] *Wells v. United States*, 280 F.2d 275 (CA 9, 1960).

[43] *Wilson v. Wilson*, 141 F.2d 599 (CA 4, 1944).

[44] *Gibson v. United States*, 161 F.2d 973 (CA 6, 1947).

[45] *Anderson v. United States*, 229 F.2d 675, 677 (CA 5, 1956).

[46] *Stout v. United States*, 229 F.2d 918 (CA 2, 1956).

[47] *United States v. Smith*, 393 F.2d 318, 319 (CA 5, 1968).

[48] *Clay v. United States*, 210 F. 2d 686 (CADC, 1953).

[49] *Blanc v. United States*, 244 F.2d 708 (CA 2, 1957).

In two of the cases, moreover, the Declaratory Judgment Act is not even mentioned.[50] In six others there is no discussion contradictory of the decision below; the courts simply state that the Declaratory Judgment Act does not in itself provide consent to sue the United States,[51] or create new substantive rights or jurisdiction,[52] or apply to suits as to federal taxes.[53] Only *Wells* (n. 36), accordingly, even contains language to support the Government's position, and that consists of a single sentence repeating the "money damage" formula of the *Jones* case (*supra*, p. 27).

The Government's cases may be supplemented by *Yeskel v. United States*, 31 F.Supp. 956 (D. N.J., 1940), which seems square holding contrary to the decision below, and by *Raydist Navigation Corp. v. United States*, 144 F.Supp. 503 (E.D. Va., 1956), which is a square holding in agreement with the decision below.

3. *The Commentators.* There has been only scant attention paid in the literature to the relationship between the Tucker Act and the Declaratory Judgment Act. *Moore* merely states the *Twin Cities* rule and accepts it without further discussion.[54] Professor Borchard, however, who was of course the chief architect of the Declaratory Judgment Act,[55] states the law as we understand it. The Declaratory Judgment, he says, may be used "within the permitted limits" but not "outside the terms of the Tucker Act." *Borchard, Declaratory Judgments*, 370, 373 (1941).[56]

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[50] *Clay*, n. 48, and *Blanc*, n. 49.

[51] *Gibson*, n. 44, *Stout*, n. 46, and *Anderson*, n. 45.

[52] *Love*, n. 41, and *Smith*, n. 47.

[53] *Wilson*, n. 43.

[54] 6A *Moore's Federal Practice* ¶ 57.02, p. 3011 (1966); see, also, *Developments in the Law – Declaratory Judgments*, 62 Harv. L.R. 787, 824 (1949).

[55] See, *e.g.*, H.R. Rep. 1264, 73d Cong., 2d Sess. 2 (1934); 69 *Cong. Rec.* 1687 (1928) (remarks of Representative Celler); *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. 15-22, 70-81 (1929).

[56] It is true that he reads *Twin Cities* as in accord with his formulation, which we do not.

4. *In Sum.* The *Twin Cities* decision, however inadequate its analysis, has been followed in two Court of Claims decisions and a district court case, and its reasoning has been substantially duplicated in one decision of the Ninth Circuit. It has, in addition, been assumed to be correct in a considerably larger number of cases which are not in fact decisions upon the point. None of the opinions in the 33 succeeding years has in any way added to the depth or the breadth of the *Twin Cities* analysis. Even with those accretions over a third of a century, *Twin Cities* simply cannot be put into the same scale, much less balanced against, the massive and penetrating analysis of the court below in this case.

### B. Other Suits Against the Government

The exclusion of declaratory relief from the Tucker Act prior to the decision below represented an anomaly in litigation against the Government. We note here the variety of suits in which it has been held available.

1. *Suits Against the Official.* There is settled authority that one may proceed in the district court for declaratory relief against the Government official who is acting in excess of his authority. *E.g.*, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139-140 (1951); *Harmon v. Brucker*, 355 U.S. 579 (1958); *United States Lines Co. v. Shaughnessy*, 195 F.2d 385, 386 (CA 2, 1952); *Van Bourg v. Nitze*, 388 F.2d 557 (C.A.D.C., 1967); *Ashe v. McNamara*, 355 F.2d 277 (CA 1, 1965); *Ogden v. Zuckert*, 298 F.2d 312 (C.A.D.C., 1961); *Bland v. Connally*, 293 F.2d 852 (C.A.D.C., 1961).

The United States, moreover, is collaterally estopped by such a declaratory judgment against its official when the the issue is presented again in the Court of Claims. This is regularly held with respect to the plaintiff in the Court of Claims, *Green v. United States*, 145 C.Cls. 628 (1959); *Edgar v. United States*, 145 C.Cls. 9 (1959); *Larsen v. United States*, 145 C.Cls. 178 (1959); *Williams v. United States*, 134 C.Cls. 763 (1956), and the necessary element of mutu-

ality ensures that the estoppel operates also against the United States. *Technograph Printed Circuits, Ltd. v. United States*, 178 C.Cls. 543, 550-551 (1967).

2. *Suits in Admiralty*. The Declaratory Judgment Act has been held to apply to the United States in actions under the Suits in Admiralty Act, because "the wording of the Declaratory Judgment Act makes it broadly applicable to 'any court of the United States' which would include, presumably, the admiralty courts." *American-Foreign Steamship Corp. v. United States*, 291 F.2d 598, 604 (2d Cir.), cert. den. 368 U.S. 895 (1961). See, too, *American President Lines v. United States*, 162 F.Supp. 732 (D.Del., 1958), aff'd 265 F.2d 552 (3d Cir., 1959); *Luckenbach Steamship Co. v. United States*, 312 F.2d 545 (2d Cir., 1963); *Luckenbach Steamship Co. v. United States*, 155 C.Cls. 81, 86 (1961).

The admiralty suit is brought against the United States *eo nomine* and is limited to a libel in personam for the recovery of money. 46 U.S.C. §§741, 742. There is no apparent reason why the same rule should not apply equally under the Tucker Act.

3. *Tort Claims Act*. A declaratory judgment is available, even where no money damages are immediately claimed, in a proceeding under the Tort Claims Act. *Pennsylvania R. Co. v. United States*, 111 F.Supp. 80 (D. N.J., 1953).[57] Here again, the United States is itself the defendant and jurisdiction is granted by 28 U.S.C. §1346(h) over "claims against the United States for money damages."

4. *NSLI Act*. The National Service Life Insurance Act provides, as the Tucker Act, that "In the event of disagreement * * * an action on the claim may be brought against the United States." 38 U.S.C. §§817, 445. "* * * if we decide

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[57] *Aktiebologet Bofors v. United States*, 93 F. Supp. 134 (1950), is a one-sentence decision to the contrary, but is of dubious authority since the Court of Appeals went off on a different ground. 194 F.2d 145, 150 (CADC, 1951).

that Section 808 authorizes suit against the Government, then I think it only reasonable to hold that Congress intended to consent to use of Declaratory judgment procedures." *Unger v. United States*, 79 F.Supp. 281, 283-284 (E.D. Ill., 1948).

5. *Trading With the Enemy Act.* So, too, declaratory relief is available in suits under the Trading With the Enemy Act, *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (CA 9, 1954), though to be sure the statutory jurisdiction ["a suit in equity . . . to establish the interest," 50 U.S.C. App. §9(a)] would seem to preclude any other result.[58]

The Solicitor General ignores this line of cases, and we can ourselves conceive of no reason why declaratory relief within the Court's subject matter jurisdiction should be available in every action against the Government except the Tucker Act.

## IV

## POLICY AND PRACTICALITY

It will be remembered that *amicus curiae* does not in any way seek to expand the type of actions which may be brought against the United States, but only by declaratory relief to settle monetary claims without awaiting the sometimes distant day when these claims have matured into a demand for the present payment of money.

Every principle of sound government and efficient judicial administration seems to point to the desirability of early rather than delayed resolution of controversies between the Government and its citizens. Indeed, one of the salient reasons for the establishment of the Court of Claims and enactment of the Tucker Act was to permit a more expeditious disposition of claims against the United States. As

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[58] When an Act is construed not to authorize suit against the United States, the Declaratory Judgment Act is of course not available. *Birge v. United States*, 111 F. Supp. 685 (W.D. Okla., 1953); *Schilling v. United States*, 101 F. Supp. 525 (E.D. Mich., 1951).

President Lincoln said in 1861, "It is as much the duty of the Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[59] The very first of the Court of Claims bills was introduced in 1854 to enable Congress "to render speedy justice to honest claimants."[60] The House Judiciary Committee reported out the bill which became the Tucker Act because "Just claims are painfully deferred [by the Congress] without interest. * * *"[61] That basic purpose of the Court, to afford speedy justice, can in cases such as those which concern *amicus curiae* (*supra*, pp. 1-5), be accomplished only through declaratory relief.

The Solicitor General urges [Br. 17-18] that use of declaratory relief would be the equivalent of a mandatory injunction against the United States—compelling the correction of records—or at least the equivalent of a remand to the officer. He looks to the binding force of the adjudication, not to the form of the decree, to draw these apprehensions. But exactly the same binding force, and exactly the same effect upon the Government's officers, is found in the final money judgment of the Court of Claims (*supra*, p. 29). The declaratory judgment differs only in that the court's direction can be given at an earlier stage, before the monetary claim has finally matured.

We dispute, in short, that the United States, in consenting to suit for money due under contracts and statutes, meant only to consent to a long-delayed and not to a prompt suit.

We do not wish to overstate the extent of the advantages which will accrue from the availability of declaratory relief under the Tucker Act. We expect, indeed, that it will markedly speed the course of justice only in a rather narrow

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[59] Cong. Globe, 37th Cong., 2d Sess., App. p. 2; *Glidden Company v. Zdanok*, 370 U.S. 530, 553 (1962); *Pocono Pines Hotel Co. v. United States*, 73 C.Cls. 447, 467 (1932).

[60] Senator Broadhead, 30 Cong. Globe, 33d Cong., 2d Sess., p. 71 (1854).

[61] H.Rpt. No. 1077, 49th Cong., 1st Sess., p. 4 (1886).

group of controversies. One reason is the express exemption in the Declaratory Judgment Act of disputes over taxes, 28 U.S.C. §2201, which alone represent 35 percent of the Court of Claims business. *Peartree, Statistical Analysis of the Court of Claims*, 55 Geo. L.J. 541, 549 (1967). A second reason is the settled requirement that the plaintiff must exhaust his administrative remedies before he files his petition in the Court of Claims. See, *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429-30 (1966); *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234 (1946), as to suits under government contracts, which represent roughly 25 percent of the Court of Claims business, *Peartree, op. cit. supra*; and *Blackmar v. United States*, 173 Ct. Cl. 1035, 354 F.2d 340, 346-47 (1965); *Hutton v. United States*, 154 Ct.Cl. 34, 39 (1961); *McAulay v. United States*, 158 Ct.Cl. 359, 361, 305 F.2d 836, 838 (1962), as to civil and military pay cases, which combined represent the third largest category and roughly 15 percent of that Court's business. *Peartree, op. cit. supra.*

But there remains a small group of cases in which a long-delayed suit, deferred while a money claim slowly matures, is perilously close to the denial of any remedy. The maritime subsidy program which concerns *amicus curiae* is probably the most significant example (*supra*, pp. 1-5).

Another example, in many ways more striking, may be found in the facts of the *Twin Cities* case itself (81 C.Cls. at 656-657). The Post Office in 1923 entered into a 20 year lease of a building constructed for that lease; an earlier termination clause in the lease was as promised cancelled in 1923. The building was not suited for other tenancy and mortgages were issued on faith of the lease. The Post Office gave notice that it would cancel the lease and move out in March 1935, as a general Federal building would then be available. Plaintiff had a monetary claim, 8 years rental, if it could wait so long. It could bring suit, too, for the first month of unpaid rent but by that time the only tenant for whom the building was suitable would have moved out, and it would be left with a lawsuit, and possibly a mortgage

default, instead of economically valuable building. The case is a classic example of the versatile utility to the plaintiff of the declaratory judgment.

As it chances, *Twin Cities* is also a classic example of the utility of declaratory relief to the defendant. Twin Cities brought suit in the Court of Claims for rent for March-June 1935, and recovered judgment in 1938. *Twin Cities Properties, Inc. v. United States*, 87 C.Cls. 531 (1938). The Government then concluded that Twin Cities should have been required to deduct the cost of heat, light, etc. which it did not pay after the Post Office left. Upon its resulting refusal to pay further rent, Twin Cities accordingly brought its third suit, for rent from July 1935 through December 1938, and again recovered rent, though with a deduction of about 9% for the unfurnished services. *Twin Cities Properties, Inc. v. United States*, 90 C.Cls. 123 (1939).[62] The parties thus were reduced to four years of litigation, and the Government in effect required to pay double rent for 8 years, simply because the Court in 1935 cursorily accepted an ill-advised argument in behalf of the Government.[63]

We can, in sum, see no reason of policy nor any practical harm to the Government if monetary claims in the Court of Claims are subject to declaratory as well as money judgment relief. Our conclusion is given strong confirmation by the Solicitor General. The Court will recall that his first application (of August 30, 1968) for an extension of time within which to file its petition for writ of certiorari advanced as its sole ground:

> "It has been necessary to consult numerous federal agencies in order to determine the potential

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[62]There are no further reported cases, and we assume that the Government paid the remaining 5 years rent without the necessity of suit.

[63]The net rent awarded in the last decision was about $65,000 a month, suggesting that the aggregate cost to the Government of victory in the first case was about $6,000,000.

impact of this decision. Additional time is required to allow study of these views and, if it is decided to file a petition, to prepare and print it."

Judging by its brief, "the potential impact of this decition," as shown by consultation with "numerous federal agencies," is indeed negligible. It appears that the Court of Claims has suggested that two plaintiffs might amend their complaints to seek declaratory relief. One involves involuntary sick leave and the other widow's benefits as affected by a discharge alleged to be wrongful [Br. 18-19]. We doubt that the foundations of the republic are put in jeopardy if Government wrongs in these areas are open to remedy. The Government, in each of the three cases brought by members of *amicus curiae* which include a prayer for declaratory relief [Br. 19], has moved for summary judgment on the ground that the cause of action is nonjusticiable. If it is right, the suits are not saved by the declaratory prayer; if it is wrong, there is no discernible harm to anyone in being able to litigate a claim when it is fresh.

## V

## PETITIONER CANNOT AT THIS STAGE OF THE PROCEEDING QUESTION THE APPLICABILITY OF THE DECLARATORY JUDGMENT ACT TO THIS CASE

*Amicus curiae* has, of course, no interest in the outcome of this particular case. It has, however, the strongest sort of interest in ensuring that the law as to declaratory relief in Tucker Act litigation be settled promptly.[64] We feel,

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[64] In addition to the three suits by members of *amicus curiae* referred to by petitioner [Br. 19] a fourth is now pending (*Moore-McCormack Co. v. United States*, C.Cls. No. 143-68), from two to four more are about to be filed, and probably a dozen others will be filed within the year if the agency persists in its "lamentable administrative practices and procedures." (*American Mail Line v. Gulick*, CADC, Feb. 17, 1969, slip p. 14).

accordingly, that we may appropriately suggest that the applicability of the Declaratory Judgment Act to the particular facts of respondent's case should not be resolved at this stage of the proceeding.

*Amicus curiae*, as urged above, considers that the Court below has jurisdiction to enter a declaratory judgment only in respect of a monetary claim, one which if sustained will sooner or later call for payment of money by the United States. If that view were accepted, close analysis and further proof seem necessary before it can be determined whether respondent has presented a monetary claim.

The Solicitor General, we believe must necessarily agree. He chose to seek certiorari at an interlocutory stage of the proceeding, thus reserving subsidiary issues for subsequent decision below. He has presented as his only question for review the broad issue of the applicability of the Declaratory Judgment Act to the Court of Claims.

The Court will not ordinarily take under review questions not listed by petitioner as "presented." Rule 23(1)(c); see, *e.g., Irvine v. California*, 347 U.S. 128, 129 (1954); *Radio Officers Union v. Labor Board*, 347 U.S. 17, 37 (1954); *Lawn v. United States*, 355 U.S. 339, 362 (1958). This case fits into none of the recognized exceptions to this rule.[65]

This case represents, moreover, a remarkably poor occasion for the Court to reach out to decide questions not pre-

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[65] This is not a jurisdictional issue, as in *United States v. Storer Broadcasting Co.*, 351 U.S. 193, 197 (1956), as all parties agree the Declaratory Judgment Act does not affect jurisdiction (*supra*, pp. 12-13). This is not plain error, as in *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947), which infects a vital phase of the case. Nor does its resolution, as in *Boynton v. Virginia*, 364 U.S. 454, 457 (1960) permit the Court to avoid broad and difficult constitutional issues. The exception for an unrepresented petitioner, as in *Pollard v. United States*, 352 U.S. 354, 359 (1957), is obviously inapplicable.

sented, in that it is remarkably difficult to determine in the abstract whether or not the plaintiff presents a monetary claim.

The difficulties of this issue are rather like artichoke leaves; as one is peeled away it uncovers another. (a) The respondent seeks a declaration that he should have been retired in 1959 for disability rather than longevity. This would obviously present a monetary claim except that he is entitled to receive the same 75% of basic pay under either form of retirement [App. 13]. (b) A monetary foundation to his suit is introduced by IRC §104(a)(4) which exempts from income taxation a "pension * * * for personal injuries or sickness resulting from service in the armed forces." The difficulty here arises from the provision in 28 U.S.C. §2201 that declaratory relief is not available "with respect to Federal taxes." (c) One may agree with the court below that a suit is not one "with respect to Federal taxes" simply because the plaintiff has tax motives for a suit involving only his retirement rating and no issue whatever under the tax laws [App. 39-40]. (d) But if the only monetary claim were the expectation of a tax refund, one could argue against the availability of declaratory relief on the theory that no non-tax monetary claim was involved. (e) That doubt might be eased or eliminated if the prior reductions in retirement pay due to taxes were, pursuant to any declaratory judgment of the court below, to be repaid by the Army disbursing officers rather than the Treasury. This is probably the case; the brief in opposition indicates (pp. 4-5, n. 7) that taxes (possibly at a standard rate) are withheld before the retirement is paid and the relief sought is a declaration that petitioner should be paid as though his records were corrected (App. 42); See 10 U.S.C. §1552(c). It might or might not be relevant if the Army would be reimbursed by the Treasury for amounts erroneously withheld and paid over as tax. We believe both evidence and the detail of the governing regulations are necessary to answer this inquiry.

All of this seems to *amicus curiae* to be a thorny underbrush, inappropriate for decision at this stage of the pro-

ceeding. The issue has also a difficulty which considerably exceeds it importance, and is hardly the sort of complex inquiry which should engage the attention of this Court.

If the Court should agree with the analysis of *amicus curiae* that declaratory relief is available for monetary claims in the Court of Claims, that Court in the further proceedings which are necessary will be fully able to determine the applicability of that rule to the claim presented by the amended petition in this case. It will be noted that the court below has itself reserved the right ultimately to decline a declaration "if the circumstances as they are developed direct that course" [App. 39].

## CONCLUSION

The Court should, for the reasons given above, hold that the Court of Claims is empowered to enter a declaratory judgment in respect of monetary claims within its subject-matter jurisdiction. The cause should then be remanded for further proceedings, including a determination whether respondent has here made such a claim.

Respectfully submitted,

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March 13, 1969

# APPENDIX

## PRIVATE ACTS PASSED BY THE CONGRESS AT THE SESSIONS PRECEDING THE FIRST COURT OF CLAIMS ACT AND THE TUCKER ACT

*Thirty-Third Congress, First Session*

The Congress passed 193 private bills in this session (10 Stat. 773-828) divided as follows:

| Topic | Number of Acts | Chapter Numbers |
|---|---|---|
| Acts calling for money payments [no omnibus bills] | 86 | 5,6,18-20,22,28,29,37, 45,51,52,55,57,58,65, 67,73,74,76-78,89,100, 112-116,118-124,126, 129,132-134,136-138, 140,143,145,147,149, 150,152,153,155,158 160,162-166,168,170, 173,176-184,186,187, 206,208-210,213,214, 233,235,238,252,255 |
| Pensions | 51 | 15,21,23,27,34,35,38-44,49,50,63,66,75,92-94,97,101,127,128,130, 139,142,148,151,157, 185,212,216,218-226, 232,234,241,257,261, 262,265,266 |
| Land Titles | 41 | 16,48 90,91,96,104,117, 125,131,135,141,144, 146,154,156,161,172, 174,175,190,205,207, 211,215,217,228,236, 237,239,240,250,251, 253,256,258-260,263, 264,275,276 |
| Vessel registry | 7 | 3,4,56,64,88,95,231 |
| Incorporation | 4 | 98,111,202,243 |
| Railroad construction | 3 | 197,229,272 |
| Release from liability for official duties | 1 | 171 |

*Forty-ninth Congress, First Session*

The Congress passed 754 private bills in this session (24 Stat. 653-880) divided as follows:

| Topic | Number of Acts | Chapter Numbers |
|---|---|---|
| Pensions | 650 | 2,10,24,25,36-39,44,45, 51-56,62,63,84-86,90, 325,358,364-380,382-90,398,399,401-415, 425-461,464-467,470-557,559,562-564,602-606,612-618,626-627, 633-635,639,641-754, 767-770,785,786,788-796,819-821,823-829, 851,852,854,856-892, 908-910,914-918,920 |
| Acts calling for money payments [Nos. 12 and 359 omnibus bills; Nos. 591 and 919 references to C.Cls.; and No. 814 payment of C.Cls. judgment] | 75 | 11,12,16-18,23,31-33, 35,43,46,77-79,336, 357,359,360,393,394, 400,419,420,462,468, 469,558,560,565,571, 586-594,596-598,607, 624,625,628-631,638, 766,777,783,787,813, 814,822,845,846,850, 853,855,904-907,911, 919,921-920,925,933, 934 |
| Relief from political disabilities | 14 | 1,13-15,34,42,65-66,68, 566,784,815,924,935 |
| Release from liability for official duties | 5 | 26,80,89,418,621 |
| Patent of land | 5 | 619,620,640,926,927 |
| Grant or extension of patent | 2 | 912,913 |
| Franking privilege | 1 | 561 |

| | | |
|---|---|---|
| Relief from taxes | 1 | 595 |
| Change of military records | 1 | 896 |

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 672

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. KING

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## REPLY BRIEF FOR THE UNITED STATES

We submit this reply brief in order to focus on several contentions advanced by respondent and *amicus curiae* in attempting to meet our argument that the decision below represents a material and unwarranted expansion of the jurisdiction of the Court of Claims.

1. Both respondent and *amicus* repeat and premise much of their briefs on the argument made in respondent's opposition to the petition for certiorari. Their contention is this: since the Declaratory Judgment Act allows "courts of the United States" to issue declaratory judgments, and since 28 U.S.C. 451 defines "court of the United States" as "including



338-087—69

the Court of Claims," it must be concluded that Congress explicitly intended to confer jurisdiction upon the Court of Claims to render declaratory judgments against the United States (*e.g.*, Respondent's Brief, p. 13; *Amicus* Brief, p. 15).

This analysis falls far short of supporting respondent's position. In the first place, the argument ignores the essential operative language of the Declaratory Judgment Act (28 U.S.C. 2201). That Act does not merely say that "any court of the United States" may enter a declaratory judgment—it states that "[i]n a case of actual controversy *within its jurisdiction,* except with respect to Federal taxes, any court of the United States" may grant such relief (emphasis supplied). As we pointed out in our main brief, this is not a case within the subject matter jurisdiction of the Court of Claims since respondent does not assert a present right to receive money from the United States, and the Tucker Act does not provide a waiver of sovereign immunity with respect to the entry of declaratory judgments against the United States in any court.[1]

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[1] None of the cases cited at pp. 40–41 of the *amicus* brief support the position that the Tucker Act grants the federal courts jurisdiction to issue declaratory judgments in actions not involving a present claim for money. Of all those cases, only two allowed declaratory relief to be sought *against the United States* in the absence of a claim for money. One was *Luckenbach Steamship Co.* v. *United States*, 312 F. 2d 545 (C.A. 2), where an action was brought in admiralty seeking a declaration that the plaintiff was not liable to the United States for "additional charter hire" of certain ships. There was no argument that declaratory relief was unavailable (*id.* at 547). More-

A second error is in respondent's and the *amicus'* disregard of the history and function of Section 451. Section 451 was added to the Judicial Code, Section 308, August 7, 1939, Ch. 501, 53 Stat. 1225, in the Act establishing the Judicial Conference and other administrative machinery. See S. Rep. No. 426, 76th Cong., 1st Sess. As we noted in our main brief, both before and after this enactment the Court of Claims held itself without power to enter declaratory judgments; the same is true of numerous courts of appeals with respect to declaratory relief sought against the United States in the district courts.

Similarly, we see no significance in the fact that in 1948 the wording of the Declaratory Judgment Act was changed from "the courts of the United States" (48 Stat. 955) to "any court of the United States" (62 Stat. 964). There is no indication that Congress intended anything more than a rewording of the statute. See H. Rep. No. 308, 80th Cong., 1st Sess., p. A177. It would be novel, indeed, if this rewording

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over, jurisdiction was rested on the Suits in Admiralty Act which provides that (46 U.S.C. 742) "any appropriate nonjury proceeding in personam may be brought against the United States" in circumstances where such an action in admiralty could be maintained against a private party. Thus the Act contains a waiver of immunity far broader than that found in the Tucker Act.

The other case is *Unger* v. *United States*, 79 F. Supp. 281 (E.D. Ill.). Contrary to the assertion of the *amicus*, jurisdiction was not rested on a statutory provision which allows actions on a "claim", but came under 38 U.S.C. 808, which gives "United States courts * * * jurisdiction to review (by motion or otherwise)" decisions of the administrator of the National Service Life Insurance Act "on all questions of law ~~(and)~~ or fact". 79 F. Supp. at 282.

could be coupled with Section 451, which is merely a defining provision, to overcome the limitations directly expressed in the Declaratory Judgment Act as well as established rules governing the sovereign immunity of the United States. The only rational conclusion is that the Declaratory Judgment Act is limited in its application to cases otherwise within the subject matter jurisdiction of the court in which it is invoked.

2. Respondent and the *amicus*[2] notably fail to explain how either of their suits comes within the accepted limitations on the Court of Claims' subject matter jurisdiction. A declaratory judgment from the Court of Claims would at best entitle each of them to assert collateral estoppel effect in other suits against officials in the Department of Defense or the Maritime Administration. Nothing in either of the briefs refutes in any way our essential position in this case—that the Tucker Act grants the Court of Claims and the district courts subject matter jurisdiction only when there is an existing right to money. This Court ong ago recognized that this jurisdictional

[2] In its brief (pp. 1–5), the *amicus* attempts to give the impression that current procedures require its members to wait many years for payment of subsidies. Although the determination of the final subsidy to be paid requires an accounting procedure that examines the events of a period that may be as long as a decade, substantial approximate payments are made quarterly throughout this period, much in the way that progress payments are made during the administration of a government contract. See 46 U.S.C. 1173(c), implemented by Accounting Instruction No. 29 (revised) and Article II-23 of the standard contract.

limit may not be abridged even by someone who claims a right to nominal damages. Respondents, the steamship companies, and the others who are now seeking declaratory judgments in the Court of Claims and who have no right to any monetary relief obviously have even a lesser right to invoke the jurisdiction of the federal courts.

Respectfully submitted.

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# SUPREME COURT OF THE UNITED STATES

No. 672.—October Term, 1968.

United States, Petitioner, v. John P. King. | On Writ of Certiorari to the United States Court of Claims.

[May 19, 1969.]

Mr. Justice Black delivered the opinion of the Court.

Col. John P. King, respondent, was retired from the Army for longevity (length of service) over his objection that he should have been retired for physical disability. Had his retirement been based on disability, Colonel King would have been entitled to an exemption from income taxation allowed by § 104 (a)(4) of the Internal Revenue Code of 1954. He brought this action in the Court of Claims alleging that the Secretary of the Army's action in rejecting his disability retirement was arbitrary, capricious, not supported by evidence, and therefore unlawful, and asked for a judgment against the United States for an amount of excess taxes he had been compelled to pay because he had been retired for longevity instead of disability. The Court of Claims agreed with the United States that the claim as filed was basically one for a refund of taxes and was therefore barred by King's failure to allege that he had filed a timely claim for refund as required by 26 U. S. C. § 7422 (a). In this situation, the Court suggested to counsel that it might have jurisdiction under the Declaratory Judgment Act and requested that briefs and arguments on this point be submitted to the court. This was done. The Court of Claims, in an illuminating and interesting opinion by Judge Davis, reached the conclusion that the court could exercise jurisdiction under the Declaratory Judgment Act. 28 U. S. C. § 2201. In so holding, the court thereby rejected the Government's contentions that

the Declaratory Judgment Act does not apply to the Court of Claims and that the court's jurisdiction is limited to actions asking for money judgments. By this ruling the court expressly declined to follow a long line of its own decisions beginning with *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 665. As the opinion of Judge Davis showed, the question of whether the Court of Claims has jurisdiction to issue declaratory judgments is both substantial and important. We granted certiorari to decide that question.

The Court of Claims was established by Congress in 1855. Throughout its entire history up until the time that this case was filed, its jurisdiction has been limited to money claims against the United States Government. In 1867 this Court held that "the only judgements which the Court of Claims are authorized to render against the government . . . are judgements for money found due from the government to the petitioner." *United States* v. *Alire*, 6 Wall. 573, 575. In *United States* v. *Jones*, 131 U. S. 1, this Court reaffirmed this limited view of the jurisdiction of the Court of Claims, and held that the passage of the Tucker Act in 1887 had not expanded that jurisdiction to equitable matters. More recently, in 1961, it was said in the prevailing opinion in *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 557, on a point not disputed by any of the other members of the Court that "From the beginning [the Court of Claims] has been given jurisdiction only to award money damages . . . ." No amendment purporting to increase the jurisdiction of the Court of Claims has been enacted since the decision in *Zdanok*.

The foregoing cases decided by this Court therefore clearly show that neither the Act creating the Court of Claims nor any amendment to it grant that court jurisdiction of this present case. That is true because Colonel King's claim is not limited to actual, presently due money

damages from the United States. Before he is entitled to such a judgment he must establish in some court that his retirement by the Secretary of the Army for longevity was legally wrong and that he is entitled to a declaration of his right to have his military records changed to show that he was discharged for disability. This is essentially equitable relief of a kind that the Court of Claims has held throughout its history, up to the time this present case was decided, that it does not have the power to grant.

It is argued, however, that even if the Court of Claims Act with its amendments did not grant that court the authority to issue declaratory judgments, it was given that authority by the Declaratory Judgment Act of 1934. Support for this proposition is drawn from the language in the Declaratory Judgment Act that "In a case of actual controversy within its jurisdiction any court of the United States . . . may declare the rights and legal relations of any interested party seeking such declaration." The first answer to this contention is that, as we have pointed out, cases seeking relief other than money damages from the Court of Claims have never been "within its jurisdiction." And we agree with the opinion of the Court of Claims in this case that the legislative history materials concerning the application of this Act to the Court of Claims "are, at best, ambigious." For the court below, it was sufficient that there was no clear indication that Congress affirmatively intended to exclude the Court of Claims from the scope of the Declaratory Judgment Act. We think that this approach runs counter to the settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed. *United States* v. *Sherwood*, 312 U. S. 584. This was precisely the position taken by the Court of Claims in

a line of its own decisions beginning with *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655 (1935). In that case, decided soon after the passage of the Declaratory Judgment Act, the Court of Claims held that it would require a specific and express statute of Congress to give the Court of Claims the power to issue declaratory judgments. The Court of Claims said in *Twin Cities* that:

> "If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised." 81 Ct. Cl., at 658.

We think that the earlier decisions of the Court of Claims and those that have consistently followed it were correct. There is not a single indication in the Declaratory Judgment Act or its history that Congress, in passing that Act, intended to give the Court of Claims an expanded jurisdiction that had been denied to it for nearly a century. In the absence of an express grant of jurisdiction from Congress, we decline to assume that the Court of Claims has been given the authority to issue declaratory judgments.

*Reversed.*